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# REPORTS

OF

# CASES

ARGUED AND DETERMINED

IN THE

# Courts of Exchequer

AND

# Exchequer Chamber.

WITH TABLES OF THE NAMES OF THE CASES AND THE PRINCIPAL MATTERS.


By ROBERT PHILIP TYRWHITT, Esq.

BARRISTER AT LAW, OF THE MIDDLE TEMPLE.


" Ejus (*Analogiæ*) hæc vis est, ut id quod dubium est ad aliquid simile de quo non quæritur referat; ut incerta certis probet."

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## DIRECTIONS TO BINDER.

**Substitute the pages 541, 542, sent with this Number, for the previous pages similarly numbered; also substitute the List of Cases attached to this Part for that given in Vol. I.**

## ERRATUM.

Page 585, line 9, for *second* read *said*.

# REPORTS OF CASES

ARGUED AND DETERMINED IN

## THE COURTS OF EXCHEQUER,

AND

## EXCHEQUER CHAMBER,

IN

## Michaelmas Term,

IN THE SECOND YEAR OF THE REIGN OF WILLIAM IV.

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### MILLER *v.* GREEN.

1831.

(In Error from the King's Bench.)

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Before TINDAL C. J.—Lord LYNDHURST C. B.—
ALLAN PARK, GASELEE, and BOSANQUET, Justices;
BAYLEY, VAUGHAN, and BOLLAND, Barons.

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Replevin for taking goods and standing corn.

Cognizance, that by deed of 25th *Sept.* 1806, *A.* (*Taylor*), granted to *B.* (*Hodgson*), an annuity charged on the premises, with power to enter and distrain for the arrears, and the distresses "to detain, manage, sell, and dispose of in the same manner in all respects as distresses for rents reserved on leases for years;" and that *C.* (*Miller*, the defendant below), as *B.*'s bailiff entered and distrained for arrears of that annuity.

Plea in bar, that by [previous] deed of 7th *May* 1806, *A.* granted to *D.* (*Walton*) an annuity charged on the [same] premises; and for better securing the payment, granted, sold, and demised them to *E.*, (*Fletcher*) for 99 years, with power of distress; and that arrears had accrued and were due.—Held,

1st, That as no entry appeared by *E*, the first grantee, or by any person in privity with him, after the demise of 7th *May* 1806, no estate vested in him at common law by that deed:—

REPLEVIN for taking goods and standing wheat. Cognizance by *Miller*, as bailiff of *Hodgson*, that *J. T.* seised in fee, devised to trustees to the use of *Taylor* for life, that on *J. T.*'s death

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*Taylor* became seised for life, and on 25th *Sept.* 1806, by indenture "gave, granted, and confirmed" to *Hodgson*, an annuity of 166*l.*, and charged the same on the premises, with power "to and for the said *Hodgson*, his executors, &c. into and upon the said messuages, lands, or premises, thereby charged or made chargeable with the said annuity or yearly sum of 166*l.*, or into or upon any part thereof, to enter and distrain for the said annuity or yearly sum, and all arrears thereof, and the distress and distresses then and there found to *detain*, *manage*, sell, and dispose of in the same manner in all respects as distresses for rents reserved upon leases for years might, were, and ought to be *detained*, managed, sold, and disposed of, and as if the said annuity or yearly sum of 166*l.* thereby granted was a rent reserved on a lease for years."

The cognizance then stated three years arrear of the annuity to have accrued during the life of *Taylor*, wherefore, &c. A second cognizance was nearly similar.

Plea in bar—That *Taylor* being seised for life, on 7th *May* 1806, being before the grant of 25th *Sept.* 1806 mentioned in the cognizance, by indenture gave, granted, and confirmed an annuity of 413*l.* to *Walton*, charged among other, upon the same premises, and that for better securing the same, he granted, bargained, sold, and demised the premises to *Fletcher*, his executors, &c. for 99 years, upon trust among others, "That in case, and when and as often as the said annuity of 413*l.* or any quarterly payment thereof should be in arrear or

---

2dly, That as no election appeared by *E*, the first grantor, to take under that deed as a bargain and sale, pursuant to the stat. of uses, and as *F*. (*Green*, the plaintiff in replevin), was not shewn to be other than a stranger to that deed, the court could not at his request, make that election for *E*. which would defeat the distress by *B*. under the subsequent deed of 25th *Sept.* 1806:—

3dly, That standing crops could not be distrained under the clause in the deed of 25th *Sept.* 1806.

Judgment entered for the plaintiff below for damages for taking the standing crops, and for the defendant below for a return of the cattle and other goods distrained.

unpaid in the whole or in part, by the space of thirty days next after any one of the days or times thereinbefore appointed for payment thereof, the said *Fletcher*, his executors, &c. did and should, out of the rents and profits of the said hereditaments thereby granted or demised, or otherwise assured or intended so to be, or by mortgage or sale thereof, or of a competent part thereof, in case there should not be sufficient distresses on the premises for all or any part of the said term of 99 years, determinable as therein mentioned, or by bringing actions against, or making distress upon all and every, or any one or more of the then present or future tenants of the said hereditaments, for recovery of the rents then in arrear, or by making entries upon the said hereditaments, levy and raise such arrears of the said annuity of 413*l.* 12*s.* as should from time to time become due and remain unpaid." Averment, "that the same indenture and the term of 99 years thereby created and granted of and in the said premises, in which, &c. in the said declaration mentioned at the time of the making of the said indenture in the said cognizance mentioned, and from thence continually hitherto were in full force and effect." That thirty days before the distress made, 2000*l.* arrears of such annuity were due, *viz.* on the 7th *May* 1829. A second, and nearly similar plea in bar.

Demurrer and joinder.

On the argument the plaintiff resisted the demurrer on two grounds, 1st. That *Taylor* having (before he granted the annuity under which defendant distrained,) by the indenture of 7th *May* 1806, granted the annuity of 413*l.*, and having demised the premises for a term of 99 years, could not afterwards, in derogation of his own by the subsequent grant, effectually charge the possession of the premises with the annuity of 166*l.* so as to enable the grantee to distrain on any other person than the grantor himself and his representatives,

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but that the right to the possession was in *Fletcher*, named in the pleas in bar, and who might recover the mesne profits from the plaintiff; 2d, That defendant's distress being only for an annuity, he could not legally take the growing crops, under 11 *G.* 2. *c.* 19. s. 8. which only extends to rents service.

The defendant supported the demurrer on two grounds; 1st, The plaintiff not having shewn that he had any interest in the land, must be considered either as privy in estate with *Taylor*, or as a stranger, and in either case is estopped from pleading that *Taylor* had not a sufficient estate in the place in which, &c. to grant the annuity and power of distress in the cognizances mentioned; 2d, because the term of years granted to *Fletcher* by the indenture of 7th *May* 1806, mentioned in the pleas in bar, did not divest *Taylor* of the right and title to grant to *Hodgson* the annuity and power of distress mentioned in the cognizance; for the grant of that first term was not followed by *Fletcher* taking actual possession of the premises granted, and the grant, whether operating under the Statute of Uses, or as a demise at common law, did not give him the actual possession, but merely the right of possession; and that no entry by *Fletcher*, nor any exercise of his right of possession appeared so as to divest *Taylor* of his possession, and of his right and title to grant the annuity and power of distress mentioned in the cognizance.

Judgment for the plaintiff below.

Defendant brought error, assigning for special errors, that plaintiff below had not averred in his pleas in bar that *Fletcher* entered upon the premises, and inasmuch as the said demises of the premises to *Fletcher* mentioned in the pleas in bar operated as demises at common law, and as *Fletcher* hath not, pursuant to either of them, entered upon the premises, no estate whatever passed out of *Taylor* by either of the said demises to

*Fletcher*; therefore *Taylor* had a sufficient estate in the premises to grant the annuities and powers of distress to *Hodgson*, as in the cognizances mentioned. 2. That it did not appear from the pleas in bar that the demises to *Fletcher* or either of them therein mentioned, were followed by his entry on the premises, or by any other act of his, so as to vest the terms thereby granted, or either of them in him. 3. That plaintiff hath not by his pleas in bar averred that he has any title to, or interest in the premises, and therefore cannot aver that *Taylor* had not a sufficient estate in the premises to grant the said annuities and powers of distress to *Hodgson*, as mentioned in the cognizances. 4. That plaintiff below being privy in estate to *Taylor*, was estopped from denying his title to grant the annuities and powers of distress to *Hodgson*, as mentioned in the cognizances. 5. That plaintiff below had not, by his pleas in bar, sufficiently traversed, or confessed and avoided the cognizances.

*Erskine* for *Miller*, the defendant below. (*a*)—It may be admitted, that if plaintiff was in under *Taylor* the grantor, or the lessee *Fletcher*, in right of a demise by either, prior to that in the cognizance, defendant as bailiff to *Hodgson* could have no right to distrain on plaintiff. Then, first, can such prior title of plaintiff be collected from this record? No portion of the estate for life and reversion of *Taylor* the grantor was taken out of him by his first demise or grant (*b*) to *Fletcher*, in *May* 1806. He might, therefore, confer on *Hodgson* a title to distrain, defeasible by the entry of *Fletcher*, and of persons claiming similar rights under him. The

(*a*) The plaintiff in error is in this report termed *defendant*, and the defendant in error *plaintiff*, that being the course adopted in the argument.

(*b*) Cowp. 600. *Goodtitle* v. *Bailey*.

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language of the deed by which *Taylor* "granted, bargained, sold, and demised" to *Fletcher*, does not of necessity operate under the statute of uses, and may apply to a bargain and sale, or demise at common law; in which case entry by *Fletcher* was necessary to take the estate out of *Taylor*. That deed having a double aspect, the predominant intention of the parties as collected from it must govern. *Roach* v. *Wadham* (*a*); *For's* case. (*b*) The intent here is not that the premises should pass by this or that particular kind of deed, but that they should pass at all events, one way or other. As the deed may enure at common law, or by the statute (*c*), then, unless it shews the grantor's intention, that it should operate by the statute, the grantee might elect to take either way. *Heyward's* case (*d*); *Darrell* v. *Gunter* (*e*). Here, as he has not elected to take under the statute, either by act *in pais*, or by ascribing in the plea in bar that operation to the deed which would best suit his purpose, the demise to *Fletcher* operates as a demise at common law. (*f*) And the object of the parties seems to have been that it should operate as such, *viz.* by leaving the possession as it was till arrears arose, when grantee might enter and distrain. The grantee's election to take under the statute, and his consequent possession are disproved by the averment of arrears of the first annuity. Then only an *interesse termini*, convertible into estate for years by lessee's entry, existed

(*a*) 6 East, 89, *per* Lord *Ellenborough*. (*b*) 8 Co. 94.

(*c*) *Roe* v. *Tranmer*, 2 Wils. 78. Shepp. T. ed. Preston 86.

(*d*) 2 Co. 35.

(*e*) Sir W. Jones, 206. 2 Ro. Ab. 787. pl. 6, 7. *Qu.* if the use of words "bargain and sell," indicates the intention of the parties? See *Barker* v. *Keate*, 1 Mod. 262. 2 Mod 253. S. C. 4 Bac. Ab. 277. 2 Bla. C. 339. *Isham* v. *Morrice*, Cro. Car. 110.

(*f*) See last note. Also Bac. Ab. Leases (M), and p. 185. 2 Sand. Uses, 49. Gilb. Uses, 230. 4 Cruise, 3d Ed. 265. tit. Deed, ch. xix. § 42. and *Preston's* argument in *Wynne* v. *Griffith*, 5 B. & Cr. 929. 933.

under the first lease, and no severance of the possession from the reversion had taken place (*a*), as was the case in *Williams* v. *Bosanquet* (*b*), by the entry of the lessee *Manham*. (*c*)—Secondly, nothing on this record shews plaintiff to be in under *Fletcher*. His entry is not averred, or that of plaintiff under him. Such a possession by plaintiff would have been that of *Fletcher*, and would have rendered the averment of arrears on the first demise immaterial. The assuming by *Taylor* to make his second grant raises the presumption that he, and not *Fletcher*, the first grantee, was at that time in possession, *Chatfield* v. *Parker* (*d*). That was trespass by the second grantee of lands as security for an annuity, against a creditor by *elegit*, to recover mesne profits. There, as in this case, the words "grant, bargain, sell, and demise" occurred, so that the deed might have operated under the statute, but plaintiff being pleaded to have been in possession at the time of defendant's seizure, the second demise to the plaintiff was held good as to all, except the first grantee, who could not be taken to have entered at the time of plaintiff's entry.—Thirdly, the plaintiff, as tenant in possession, was peculiarly conusant under what title he came in, and when the arrear to *Hodgson* became due. Then it was not incumbent on defendant to state by what title plaintiff was in possession at that time, or that he claimed under the first grantee, *Fletcher*; and plaintiff should have pleaded in bar how he was not liable to the distress. *Hool* v. *Bell* (*e*); *Miles* v. *Willoughby* (*f*). The plaintiff may be properly presumed

(*a*) Litt. § 58. Co. Lit. 46 b.

(*b*) 1 B. &B. 238.

(*c*) See Co. Litt. 270 a. Bac. Ab. Leases (M). Vin. Ab. Distress, 62. citing *Wade* v. *Marsh*, Latch. 211.

(*d*) 8 B. & C. 542. And see *Bayley* J.'s judgment, *id.* 550.

(*e*) Ld. Ray. 172. Lutw. 1227. 3 Salk. 136. S. C.

(*f*) Cro. Car. 547. 2 Roll. R. 370.

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to be in, and to claim under grantor by title accruing after the rent charge granted, so that his goods were liable to distress for the arrears. *Com. Dig. Distress,* (B. 2.) Even in the cases in (B. 1.) which only apply to strangers' cattle escaping to, and *dam. feas.* in the *locus in quo,* and which are not distrainable for rent-charge, unless levant and couchant, the plaintiff in replevin must plead in bar, that they were not so levant, &c. *Jordan* v. *Martin* (*a*).

Lastly, though 11 G. 2. c. 19. § 8. only authorises a distress of growing corn for arrears of rent *service,* for which distress lies of common right, the special words of the deed (*ante,* p. 2.) give that power by placing the grantor on the footing of the owner of a rent service. But the plaintiff, by replevying, has admitted standing corn to be a distrainable chattel (*b*), and cannot now urge that it is not. Replevin does not lie of that which cannot be distrained, *e. g.* trees growing. *Bac. Ab. Replevin,* (F.)— [*Bayley* B. Newly invented clauses of distress do not preclude the common law of replevin. *Co. Lit.* 145 *b.* 282 *b.* — *Tindal* C. J. It is sought to enlarge the subject matter of distress by adding an article not contemplated at the time of granting the power.]

*Preston* for *Green,* the plaintiff below.—The language of the deed cannot make the growing crops of a stranger liable to a distress, where the statute does not apply, though perhaps it might have that effect *quoad* chattels in the possession of the grantor himself or his executors.

In these transactions, if the grantor of an annuity has previously put a tenant in possession, grantee cannot

(*a*) 1 Mod. 62. cited Bac. Ab. Replevin (K), vol. 6. p. 80. See also Vin. Ab. Distress I. pl. 34. 43. [O 2.] pl. 24. *Britton* v. *Cole,* 1 Ld. Ray. 308.

(*b*) See *Glover* v. *Coles,* 1 Bing. 9. Per *Richardson,* J. so held for the purpose of satisfying the condition of a bond for replevying goods and chattels.

distrain; a term is therefore interposed in order by giving the termor a reversion to enable him so to distrain. *Taylor* by granting an annuity in *May* 1806, and having demised the premises for a term by the same deed, could not in derogation of his own grant, confer a right of entry on the possession of the first grantee, though he might be estopped from disputing a right so conferred, if exercised on his own possession, or that of his personal representative.

It is conceded, that if the first term granted be an actual term, it is perfectible by the statute of uses. Then defendant could not distrain, unless he could shew the plaintiff to be estopped by the deed of the grantor, under whom he came in. A lessee who has not perfected his term by entry is notwithstanding liable in covenant. (*a*) *Fletcher*'s title is said not to be perfected, because entry at common law, or possession by virtue of the statute are not stated. But the plaintiff, a stranger, is not grantee so as to elect to be in in either way. There is a money consideration, and the grantee *Fletcher* uses the term as a bargain and sale, the shape which is alone adequate to his purpose, thereby assuming to take under the statute of uses. The tenant in possession will be liable to an action for mesne profits by *Fletcher*, who may enter at any time.—[*Tindal*, C. J. Ejectment must first have been brought, and his title to enter must have been proved.]

The plaintiff tendered issue, whether the term set up by him was perfect, *viz.* a vested estate by force of the statute or not; then the defendant ought to shew that the goods were liable to distress; and it did not lie on the plaintiff to allege the negative of privity with *Taylor*.

*Erskine* in reply.—The plaintiff is subjected to no hardship to which he was not liable by taking posses-

(*a*) See authorities collected in *Williams* v. *Bosanquet*, 1 Br. & Bing. 238.

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sion as he did, and if he took under grantor, has remedy against him. The grantee must elect under the deed, and the court cannot.

In *Michaelmas Term*, TINDAL C. J. delivered the judgment of the Court.

This was an action of replevin for taking certain goods, as well as certain standing crops of *Green*, the plaintiff below, in which action *Miller* the defendant below made cognizance as bailiff of one *Wm. Hodgson*, and in his first cognizance, which differs from the second only in deducing the title of *Geo. Taylor* from the owner of the fee, states, that *Geo. Taylor* being seised for life by an indenture dated the 25th *Sept.* 1806, granted to the said *Hodgson* an annuity of 166*l.* 2*s.* out of the premises in which, &c. for the term of 99 years if *Taylor* should so long live, payable in the manner therein mentioned, which had become due from *Taylor*, and had continued so due for more than 21 days, and justifies the taking and detaining the goods as a distress for such arrears.

To this cognizance the plaintiff below pleaded in bar, that before the making of the indenture stated in the cognizance, *viz.* on the 7th *May* 1806, the said *Geo. Taylor* being seised for the term of his life, by another indenture then made between himself of the first part, the persons therein mentioned of the second part, one *Jackson Walton* of the third part, and one *Fletcher* of the fourth part, in consideration of the sum of 3000*l.* to *Taylor* paid by *Jackson Walton*, granted to said *Walton* an annuity of 413*l.* 12*s.* out of the said premises, in which, &c. for 99 years, if *Taylor* should so long live, and for the better securing of the said annuity for the considerations in the said indenture mentioned, and of 10*s.* paid to *Taylor* by *Fletcher*, the said *Taylor* granted bargained, sold, and demised to the said *Fletcher* the said

premises, in which, &c. for 99 years, if the said *Taylor* should so long live, upon trust, that as often as the said last mentioned annuity of 413*l.* 12*s.* or any quarterly payment thereof should be in arrear by thirty days, *Fletcher* should out of the rents and profits of the said premises, or by mortgage in case there should not be sufficient distresses, or by making entries, levy such arrears and damages. The plea in bar then proceeds to allege, that the said indenture "and the term of 99 years thereby granted were in full force and effect," and that upwards of 30 days before the making of the distress, there was due and owing by virtue of the said indenture of the 7th *May*, the sum of 2000*l.* for arrears of the said annuity.

A similar plea in bar was pleaded to the other cognizance.

To these pleas in bar there was a general demurrer and joinder, and after argument, the court of King's Bench gave judgment for the plaintiff below for his damages and costs.

Upon this judgment a writ of error has been brought, and after argument, and time taken to consider, the Court of Error is of opinion, that the judgment of the court below ought to be reversed.

The argument in this case has turned on the legal operation and effect of the demise from *Taylor* to *Fletcher*, contained in the indenture of 7th *May* 1806. For if such demise created a legal estate in *Fletcher*, the grant of the annuity by *Taylor* to *Hodgson* by the subsequent deed of the 25th *Sept.* 1806, but during the continuance of *Fletcher*'s interest, must be altogether inoperative in creating any charge upon the premises.

Now, in order to give an estate to *Fletcher*, it is contended by the plaintiff below, that the grant must either be considered as a demise at common law, or as a bargain and sale made upon a consideration of money, and

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operating under the Statute of Uses; in either of which cases the estate vests in *Fletcher* the grantee.

The first question therefore is, Whether the grant can be considered as a lease at common law?

The objection taken to it as a lease at common law is, that it does not appear upon the pleadings that *Fletcher* the lessee, or any person claiming under him, entered after the lease was granted, and that unless there is an entry by the lessee, or some one claiming under him, no estate vests in him. And such we consider to be the effect of the authorities. It is laid down in *Co. Litt.* 46 *b*, "that to many purposes the lessee is not tenant until he enters; as a release made is not good to him to increase his estate before entering — neither can the grantor grant away the reversion by the name of the reversion before entry." Now, both these consequences depend upon the assumption that the estate has not passed out of the lessor into the lessee before he has by his entry accepted such estate: for if the estate had actually passed to and vested in him, there can be no reason why a release would not increase such estate; nor again, why the reversion should not pass by that name. And in further support of the distinction, Lord *Coke* goes on to say, "but the lessee, before entry, hath an interest, *interesse termini*, grantable to another;" thus putting in contradistinction, the *interest*, and "the *estate* of the lessee." Again, *Littleton*, sect. 459, lays down the same doctrine more pointedly: "If the lessor release to the lessee all his right, &c. before that the lessee had entered into the same land by force of the same lease, such release is void, for that the lessee had not possession in the land at the time of the release made, *but only a right to have the same* land by force of the lease. See also *Bacon's Abridgmt.* tit. *Leases* (M.), where the necessity of an entry by the lessee in order that the estate may vest in him, is put upon the ground

that it is an acceptance by him of the estate. Under these authorities therefore we think, that as the plaintiff neither alleges an entry by *Fletcher* under the lease, nor any privity between his possession and *Fletcher*'s term; nor anything equivalent to an entry, such as an acceptance of the estate by the execution of the lease, no estate passed to *Fletcher* under the lease of the 7th *May*; and consequently that the estate remained in the lessor, and that the grant of the annuity, and the power of distress to *Hodgson* by the indenture of the 25th *Sept.* was a grant capable of taking effect.

But it is contended by the plaintiff below, that if the grant of the 7th *May* cannot take effect as a lease at common law, at all events it is good to pass the estate to *Fletcher*, as a bargain and sale under the operation of the Statute of Uses.

It is undoubtedly true, that where a deed may enure to divers purposes, he to whom the deed is made, shall have election which way to take it, and may take it in that way as shall be most for his advantage, (*Shep. Touchst.* 83); and therefore, if a man for money demises, grants, bargains, and sells to *J. S.* his land for years, *J.S.* has election to take it, either by demise at the common law, or by bargain and sale. *Heyward*'s case (*a*). So that *Fletcher* in this case, or any person claiming under *Fletcher*, and in privity with him, might at any time elect to claim under the deed which way they would. But the plaintiff who pleads this grant is, so far as appears on the record, a stranger to it, and therefore the plaintiff is not competent to elect for *Fletcher*, whether the grant to him shall operate the one way or the other. Nor indeed does the plaintiff shew that any election has been made by any one, that the deed shall

(*a*) 2 Co. 35 b.

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be held to operate under the statute. It is not even stated, as was before observed, that *Fletcher* ever executed the deed, so as to assent to take any estate under it. For any thing that appears to the contrary, he is as much a stranger to it as *Green* the plaintiff. Under these circumstances, we consider the court cannot be called upon to exercise an election for the grantee at the request of a stranger, for defeating a subsequent grant of an annuity for a valuable consideration. The grant therefore, must be left to such operation as it will have as a lease at common law, which we have already seen, will not be sufficient to create an estate in the lessee for want of an entry. We therefore think the term of years set up under that grant, forms no answer to the cognizance under the subsequent annuity deed.

Although however the defendant below had the right to distrain for the arrears of his rent charge, yet upon the due construction of the power of distress contained in the deed, we think it did not extend to the growing and standing crops which have been taken under it.

It is well known, that at common law distresses taken for arrears were not saleable, but could only be kept as a pledge for the rent. But by 2 W. & M. stat. 1. c. 5. goods and chattels distrained for rent due under a *contract* may be kept and sold in the manner pointed out by that statute. It was not until the 11 G. 2. c. 19. that landlords had power to distrain corn, grain, or other produce *growing* on the land *demised*. The grantee of the rent charge is empowered by the deed "to detain, manage, sell, and dispose of the distresses, in the same manner in all respects as distresses for rents reserved upon leases for years, and as if the said annuity was a rent reserved upon a lease for years;" and we think these words are fully satisfied by holding them to grant the powers which were given to landlords

under the stat. of 2W.&M. c.5. without extending them to the new subjects of distress first granted by 11G.2. c.19. A power like the present ought at all times to be construed strictly, and more especially when it is sought to bring within it the growing crops of a person who is a stranger to the deed.

Upon the whole, therefore, we think the present judgment should be reversed, and that judgment should be entered for the person making cognizance for a return of the cattle, goods and chattels which were taken by distress, and for that part of the distress only: with a judgment for the plaintiff for damages for taking and detaining the growing crops.

Judgment accordingly.

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## RICKETTS *v.* LEWIS.

(In Error from the King's Bench.)

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Before TINDAL C. J. — ALLAN PARK, BOSANQUET, and ALDERSON, Justices. — GARROW, VAUGHAN, and BOLLAND, Barons.

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TINDAL C. J. — This action was originally brought in the Common Pleas, the judgment of which Court was affirmed in the King's Bench on error. Another writ of error has now been brought to this court: but we are of opinion that this is not a case within the meaning of 11 G. 4. and 1 W. 4. c. 70. § 8. which applies only to cases originally commenced in the court to

After judgment in K.B. on writ of error from C.P. no writ of error lies to the new court of error erected by 11 G. 4. and 1 W. 4. c. 70. § 8.

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which the writ of error is directed. Were we to hold otherwise, a strange anomaly might arise; for a case originating in the Common Pleas, and reversed on writ of error in the King's Bench might come back from thence to be heard in this Court, before the judges of the Common Pleas and Exchequer; the effect of which might be, that the judges of the Common Pleas, with the assent of one of the Barons of the Exchequer, might affirm their own previous judgment, and reverse the judgment of the King's Bench delivered by that court as a court of error.

The entry of the cause by the clerk of the errors was accordingly struck out.

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## GURNEY *v.* GORDON.

(In Error from the King's Bench.

Before the same JUDGES.

*A writ of error sued out on 27 El. c. 8. after 12th Oct. 1831. is coram non judice.*

TINDAL C. J.—In this case the writ of error was sued out on the old statute 27 El. c. 8. and has been returned under 11 G. 4. and 1 W. c. 70. § 8. which erected the present Court of Error. The suit, therefore, is brought *coram non judice*.

The entry was struck out accordingly.

(In the Exchequer of Pleas.)

BALME and Others, Assignees of BANKART and BENSON, Bankrupts, *against* HUTTON, Esq. Sheriff of Yorkshire, JEWISON, chief, and INGHAM, deputy Bailiff of the Honor of Pontefract, WOOD and Others.

Goods were seized and sold under a *fi. fa.* by a chief bailiff of a franchise, having sole execution of writs therein, after an act of bankruptcy committed by the defendant, but without knowledge thereof and before the commission issued. Held that trover would not lie by the assignees against the chief bailiff, though the property in the goods vested in them by relation to the act of bankruptcy. *Secus* as to the deputy bailiff who had taken indemnity from the judgment creditors.

TROVER for machinery, with counts on a conversion before and after the bankruptcy. The general issue was pleaded by all the defendants. *Hutton* severed in pleading from the others, as did also *Jewison* and *Ingham*.

At the *Yorkshire* Summer assizes in 1829, a general verdict was found for the defendant *Hutton*, and against the defendants Messrs. *Wood*. A special verdict was found as to the liability of *Jewison* and *Ingham* as chief and deputy bailiffs of the honor of *Pontefract*, having the execution and return of all writs in that liberty as follows.

*Bankart* and *Benson*, trading in partnership within the honor of *Pontefract* in the county of *York*, were indebted to the defendants, the Messrs. *Wood*, on 27th *October* 1825, in a sum of money exceeding 3500*l.* for wool sold and delivered; and upon that day, at the request of the said Messrs. *Wood*, executed a warrant of attorney for securing that sum, and such further advances as in the whole should amount to a sum not exceeding 5000*l.*, which warrant of attorney was filed within 21 days from the date thereof, pursuant to 6 G. 4. c. 16. and judgment by *nil dicit* was entered up thereon on the 14th *November* following. On 31st *December* 1825, the said *Bankart* and *Benson* committed an act of bankruptcy. On the 25th *January* 1826, the defendant *Ingham*, *Jewi-*

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son then being chief bailiff of the honor of *Pontefract*, within which honor he has the execution of all writs and appoints his own deputies, from whom he takes bonds with sufficient sureties to indemnify him from their acts, by virtue of a warrant directed to *Jewison* and his deputy *Ingham*, by the defendant *Hutton*, the then sheriff of the county of *York*, founded on a writ of *fi. fa.* issued at the suit of the defendants Messrs. *Wood* against the said bankrupt under the judgment aforesaid, indorsed to levy 1521*l.* 12*s.* 10*d.*, besides, &c. seized in execution certain machinery and utensils of the said bankrupts, in a mill occupied by them at *B.* and remained in possession under the same warrant. On the same day a valuation of the said machinery and utensils, together with the said bankrupt's tenant right in the said mill was made by the defendant *Ingham*, amounting together to the sum of 1485*l.*; and the said machinery and utensils, and tenant right, were on that day purchased at such valuation from the said *Ingham* acting on behalf of the said chief bailiff, by one *Barker*, a clerk or bookkeeper of the said Messrs. *Wood*; but no money was paid by him or them to *Ingham*, except the sheriff's poundage and other costs of the levy. Immediately upon the sale *Barker* took possession of the mill, machinery and utensils, on behalf of Messrs. *Wood*, and retained possession until the 17th *February* following, when the machinery and utensils were sold by public auction for the sum of 964*l.* 14*s.* 6*d.* the tenant right in the said mill remaining unsold, but being of little or no value, and the proceeds of such sale were paid over by *Barker* to Messrs. *Wood*. On the day of the sale to *Barker*, Messrs. *Wood* agreed to indemnify the defendant *Ingham* from any action for making the levy, and a bond of indemnity was afterwards executed. On the 21st *February* 1826, a commission of bankrupt issued against *Bankart* and *Benson*, under which they

were declared bankrupts on the 24th day of the same month. Neither the sheriff nor the chief bailiffs, nor *Ingham* knew or had any notice of any act of bankruptcy by *Bankart* and *Benson*, before the return of the writ of *fieri facias*.

This case was argued in *Trinity* Term 1831, at great length. A general sketch of the arguments will be sufficient in consequence of the great minuteness with which the judgment reviews the leading authorities.

*Starkie* for the plaintiffs, (*J. Williams* with him)—The plaintiff's proofs in support of an action of trover being confined to property and conversion, a sheriff who deals with property affected by a previous act of bankruptcy, is not excepted from the operation of that rule of evidence. His risk in so doing without being able to discover the event which has conferred the property on the assignees, is no greater than that of a *bonâ fide* purchaser from the bankrupt at a period beyond the two months allowed by 6 G. 4. c. 16. §. 81. A servant who does an act apparently legal by order of his master and for his benefit, and who in the event incurs personal liability for an illegal act, might equally urge hardship; *Perkins* v. *Smith*. (*a*)—[*Bayley* B. On that special verdict the servant must be taken to be a pure volunteer, for the master's order cannot be inferred.—] If the order was express, as *e. g.* to go and receive goods from another, the hardship would be the same on both. *Phillips* v. *Thomson* (*b*) is opposed to *Bayly* v. *Bunning* (*c*), which with *Cole* v. *Davis*, (*d*) *Letchmere* v. *Thorowgood* (*e*) was reconsidered in *Cooper* v. *Chitty*, (*f*) a case which goes on general principles, and cannot be supported on the ground of notice to the sheriff.

(*a*) 1 Wils. 328. (*b*) 3 Lev. 193. (*c*) 1 Lev. 173.
(*d*) 1 Ld. Ray. 724. Hil. 10 W. 3.
(*e*) 3 Mod. 236. 1 Show. 12. Comb. 123. (*f*) 1 Burr. 26.

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*Timbrell* v. *Mills* (*a*) is contrary to the later cases, and is not in trover. The judgment of *Ashurst* J. in *Smith* v. *Mills*, (*b*) *Potter*, assignee, v. *Starkie*, (*c*) *Lyer* v. *Lamb*, (*d*) *Wyatt* v. *Blades*, (*e*) are in point. *Hitchin* v. *Campbell*, (*f*) *Allanson* v. *Atkinson*, (*g*) *Stead* v. *Gascoyne*, (*h*) *Lazarus* v. *Waithman*, (*i*) *Price* v. *Helyar*, (*k*) *Notley* v. *Buck*, (*l*) *Hartley* v. *Hornby*, (*m*) *Dillon* v. *Langley*, (*n*) were also cited on the general point.

It was added that *Ingham*, who acted by *Jewison's* authority, and had taken indemnity, was thereby identified with the execution creditor. *Bloxham* v. *Oldham*, as cited in *Cooper* v. *Chitty*. (*o*)

*F. Pollock* for defendants (*Alexander* with him).—*Lee, Assignee, &c.* v. *Lopez* (*p*) shews that a sheriff, who, compelled by a *fi. fa.* seizes and sells, and afterwards pays over a year's rent to a landlord, without knowledge of a previous act of bankruptcy by the debtor, and before notice of a commission against him, cannot be compelled to pay it over again to the assignees, in an action for money had and received; which, by waiving the tort, would affirm the sale. In *Clarke* v. *Ryall* (*q*) the same law is assumed. Nor before the modern cases was he thought liable in trover, *i. e.* to be made a tort feasor by relation. *Bayly* v. *Bunning*, *Cole* v. *Davis*, *Letchmere* v. *Thorowgood*. By 13 *El.* c. 7. s. 2. (*r*) the

(*a*) 1 Bla. 205. (*b*) 1 T. R. 475.

(*c*) Exch. Mich. 1807. Selwyn, N. P. 8 Ed. 1431. 4 M. & S. 260. and see infra.

(*d*) *Quære*, 1 M. & Payne, 557. *n*. 5 B. M. 319. S. C. with *Potter* v. *Starkie*.

(*e*) 3 Camp. 396. (*f*) 3 Wils. 304. (*g*) 1 M. & S. 533.

(*h*) 8 Taunt. 527. (*i*) 5 Moore, 312. (*k*) 4 Bing. 397.

(*l*) 8 B. & C. 160.

(*m*) K. B. Not reported. It is believed no judgment was given.

(*n*) 2 B. & Adol. 131. (*o*) 1 Burr. 26, 27. (*p*) 15 East, 230.

(*q*) 1 Bla. R. 642. and see *Phillips* v. *Thomson*, 3 Levinz. 193. *Timbrell* v. *Mills*, 1 T. R. 475.

(*r*) See also 1 J. c. 15. s. 13. 5 G. 2. c. 30. s. 26.

sheriff who obeyed the law could not be said to be bound by the act or order of the assignees, as a person "*claiming by, from, or under* the bankrupt." The more general terms of the existing bankrupt act (6 G. 4. c. 16, s. 12. (*a*) may be said to include sheriffs; but the only word of relation in it is "*his*" lands, money, &c. possessed before he became bankrupt. Payment of a debt may, before commission issued, be enforced by the trader who has committed an act of bankruptcy; *Prickett* v. *Down*. (*b*) *Cooper* v. *Chitty* has been said to establish the sheriff's liability in the action of trover; but that case, properly understood, does not necessarily support *Potter* v. *Starkie*, (*c*) by which the later decisions have been so much guided. On one or other of those cases depend all the decisions cited for the plaintiffs. Thus *Carlisle* v. *Garland* (*d*) goes on *Price* v. *Helyar*, (*e*) which, with *Dillon* v. *Langley*, (*f*) turned on *Potter* v. *Starkie* and *Cooper* v. *Chitty* only. The passage in *Blackstone*'s report of the latter case, p. 69.—"But had the sale been immediately after the seizure, still the sheriffs would have been liable"—does not apply to the point in judgment, is not found in the fuller report of *Burrow*, and is contrary to *Timbrell* v. *Mills*. (*g*)—[Lord *Lyndhurst*, C. B. In *Timbrell* v. *Mills*, which occurred between two and three years after *Cooper* v. *Chitty*, the same judges gave a construction to it directly the reverse of that for which it was cited before them by Serjeant *Nares*.]—*Smith* v. *Mills* (*h*) only shews that trespass would not lie against a sheriff who only sells after notice of the commission, but according to *Black-*

(*a*) See s. 13, and s. 81.

(*b*) 3 Camp. 131. see per Grant M.R. 14 Ves. 557. Till assignment the property in goods is not out of the bankrupt: *Cary* v. *Crisp*, 1 Salk. 108. *Brassey* v. *Dawson*, Stra. 981.

(*c*) See pa. 20. n. (*c*) (*d*) 7 Bing. 298. (*e*) 4 Bing. 397.

(*f*) 2 B. & Adol. 131. (*g*) 1 Bla. R. 205. (*g*) 1 T. R. 475.

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*stone*'s report of *Cooper* v. *Chitty*, trover would. *Lazarus* v. *Waithman* (*a*) was not cited in *Price* v. *Helyar*. The decision in *Stevens* v. *Elwall* (*b*) does not follow from *Cooper* v. *Chitty*. Mr. J. *Buller*'s judgment in *Vernon* v. *Hankey* (*c*) shews his opinion to have differed from the judgment in *Potter* v. *Starkie*. *Coles* v. *Wright* (*d*) and *Crosby* v. *Crouch*, (*e*) shew that a party acting ministerially only in removing a bankrupt's goods, is not liable. As to the indemnity taken by *Ingham*, is he more or less a tort feasor on that account?

*Starkie* in reply.—The plaintiff's proposition is, that assuming the property to be in the assignees, the sheriff converted after it vested in them. It is admitted that any person, except the sheriff, who had so converted the goods would be liable by relation to the preceding act of bankruptcy. The sheriff's office is always contemplated as one of peril and responsibility for any mistake, (*f*) but would cease to be such if notice of the bankruptcy was given him in every case. In the judgment in *Cooper* v. *Chitty*, that notice is assumed to have been given, but it does not appear on the special case itself. Conversion, not intention, or *scienter*, is the gist of trover. In *Hartley* v. *Hornby*, an action against a sheriff for money had and received under similar circumstances, it was not argued that the sheriff was liable in trover, but his counsel was asked "whose were the goods at the time of sale, and whose the money they produced?" On *Prickett* v. *Down*, it has been argued that the law will protect what it compels; *e. g.* it will protect a payment by compulsion to an executor who has wrongfully obtained probate; but a sheriff is not so compelled to take the goods of other persons. The hazard of the sheriff is

(*a*) 5 Moore, 312. (*b*) 4 M. & S. (*c*) 2 T. R. 113.
(*d*) 4 Taunt. 198. (*e*) 11 East, 256. 2 Camp. 266. S. C.
(*f*) See *per* Lord *Mansfield*, 1 Burr. 33.

not distinguishable from that of the judgment creditor. Though it must always be difficult to fix the point of time when the bankrupt's property shall vest in his assignees, it is best so to vest it in them by relation to the act of bankruptcy; for if it did not vest till the assignment, then during the time occupied in obtaining the commission, &c. the whole property might be swept away. The whole weight of the modern decisions is against the defendants.

*Cur. adv. vult.*

Lord LYNDHURST C. B. now delivered the judgment of the Court.

This was an action of trover by the assignees of *Bankhart* and *Benson*, bankrupts, against (amongst others) *Hutton*, the sheriff of the county of *York*, *Jewison*, the chief bailiff of the honor of *Pontefract*, (to whom the execution of all writs within that honor belongs,) and *Ingham*, his (*Jewison*'s) deputy. The jury, as to *Jewison* and *Ingham*, found a special verdict, the material facts of which are as follows:—

On the 14th *November* 1825, judgment was entered up upon a warrant of attorney against *Bankhart* and *Benson*, at the suit of Messrs. *Wood*, upon which a writ of *fieri facias* was afterwards issued, returnable on *Monday*, next after eight days of the Purification, that is, the 13th *February* 1826. On the 25th *January* 1826, *Ingham* seized under a warrant from the defendant *Hutton*, grounded upon the said writ of *fieri facias*, and directed to *Jewison*, the chief bailiff, and *Ingham* his deputy, and on the same day, *Barker*, the book-keeper of Messrs. *Wood*, purchased what *Ingham* had so seized, but no money was paid by *Barker*, except the poundage and the costs of the levy. *Barker* resold on the 17th *February*, and the produce of sale was paid to Messrs. *Wood*. *Ingham* seized under an agreement for indemnity

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given him by Messrs. *Wood*, which indemnity was afterwards given. *Jewison* has bonds of indemnity, with sufficient security, from *Ingham*, and whomsoever he appoints as his deputies, to indemnify him against the acts of such deputies. On the 31st *December* 1825, *Bankart* and *Benson* committed acts of bankruptcy, but no commission issued until the 21st *February*, 1826, and neither the sheriff, nor the chief bailiff, nor *Ingham*, knew of any act of bankruptcy before the return of the *fieri facias*.

The seizure, therefore, and the sale to *Barker*, and whatever was done under the *fi. fa.*, was done in utter ignorance of any act of bankruptcy, and though there appears to have been some haste, and ground for some suspicion in the sale to *Barker*, yet as the special verdict draws no conclusion of fraud in that part of the transaction, we are not at liberty to draw any.

The question put to us is, Whether, upon the whole matter, *Jewison* and *Ingham*, or either of them, is guilty? There is certainly a distinction between *Jewison* and *Ingham*: *Jewison*, indeed, has a security, but it is only the ordinary security which he takes from every deputy upon his appointment, that he shall be indemnified from the acts of such deputy; whereas *Ingham* has a special indemnity against this particular seizure, and he has thereby identified himself with the persons with whom he has this indemnity, that is, the execution creditors. To make *Jewison* liable, under circumstances which would not otherwise make him liable, merely because he has sureties to whom he might resort for indemnity, would be to increase the responsibility of the chief bailiff to an unreasonable extent, as well as to impose a hardship upon the sureties which they could scarcely have contemplated. Indeed, upon the argument, this point, that the chief bailiff had security, was not pressed; and we are not aware of any case which would

have justified the contrary course of pleasure. The chief bailiff takes security, to enable him to throw upon others the responsibility the law casts upon him; but it is contrary to the spirit upon which that security is taken, to give it the effect of casting a responsibility upon him with which he would not otherwise be burthened; and we are of opinion that he stands in the same situation as if he had not taken it.

The taking an indemnity against the consequences of a particular seizure, stands upon a very different footing. It puts the officers who take it in the same situation as the person who gives it, and this was pressed in the argument as bearing upon *Ingham*, and distinguishing his case from *Jewison*'s. *Aldridge* v. *Ireland* (*a*) is a direct authority upon this point. *Bloxham* v. *Oldham* (*b*) might possibly also have proceeded upon this ground, as to the sheriff. As to *Ingham*, therefore, we have no doubt but that there must be judgment against him.

As to *Jewison*, he stands in the situation of the sheriff in ordinary cases; if the sheriff would be liable, he is liable; if the sheriff would be exempt, he is exempt. Is the sheriff then liable, who seizes and sells upon a *fi. fa.* against a trader who has committed a secret act of bankruptcy, of which the sheriff is wholly ignorant? We admit the plaintiff in the execution is liable, because he is bound in this respect by the relation back to the act of bankruptcy which the bankrupt laws occasion; but upon the best consideration we can give the point, and a careful attention to the different authorities which bear upon it, we are of opinion that the sheriff is protected by his official character and condition, and that he is not to be made a wrong-doer, so as to be answerable in any species of action by relation. We know a distinction has been made between an action

(*a*) Easter Term, 24 G. 3. cited 1 Taunt. 273.

(*b*) Cited 1 Burr. 26.

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of trespass and trover, and a distinction certainly does exist, because the execution creditor will be liable in trover, though not in trespass, and so will the sheriff, if he acts after the knowledge of bankruptcy; and it has been supposed that the sheriff, though exempt in all cases from an action of trespass, is liable in all cases to an action of trover; and though he is as ignorant and innocent when he sells and pays over the money, as he was when he seized, he is to be considered guilty of a wrongful conversion, and to be answerable to the assignees in an action of trover.

There are certainly several recent decisions founded upon that distinction, and had the earlier authorities been brought fully before the Court in any of them, they might have had a degree of weight which it would have been difficult to have withstood; but if it should turn out that they were grounded almost entirely upon one case, that of *Cooper* v. *Chitty*, (*a*) without the attention having been directed to any of the earlier authorities, and that they proceeded upon an erroneous view of *Cooper* v. *Chitty*, the influence of these decisions will be diminished, and it will be the duty of the Court to restore to the sheriff that protection to which we think he is by law entitled, namely, the protection of not being considered guilty of a wrongful conversion in trover, where he acts innocently and in strict obedience to the command of the writ under which he acts.

The sheriff does not act of his own accord, or for his own benefit; he acts as a ministerial officer in execution of the command he receives from a court of justice in the king's name, and if what he does is, at the time he does it, in strict obedience to that command, if it be what the Court itself, if it could, would have done, and if it be at that time justifiable by the writ under which he acts, it is a

(*a*) 1 Burr. 26.

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strong position to advance, that subsequent events shall make that a wrongful act in the sheriff, which, at the time he did it, was rightful; and shall make him answerable as a wrongdoer, for what, at the time he did it, it was his duty to do.

The writ in this case commanded the sheriff, and through him the chief bailiff, "to cause to be made, &c. of the goods and chattels of *Bankart* and *Benson*;" and of whose goods and chattels was the money made—in whom was the property at that time? Notwithstanding the bankruptcy, the property remains in the bankrupt till assignment. The crown may seize it as the bankrupt's property, notwithstanding a commission, at any time before the assignment, because the relation which the bankrupt laws occasion does not bind the crown. *Brassey* v. *Dawson*. (*a*)

It is no answer to an action in the bankrupt's name that he is become bankrupt, and that a commission has issued against him, because until assignment the property is not transferred. It remains in the bankrupt. *Cary* v. *Crisp*. (*b*) It is only by relation, therefore, that the sheriff or public officer is to be made a wrong-doer; and what is the law as to the doctrine of relations? It is laid down in 3 *Coke* 29 *b*. that no relation shall make that tortious which was lawful; for relations are fictions in law which shall never do wrong. In case of relations and other fictions of law they are to certain purposes, and extend only to certain persons. *Ventris* says relations shall not do wrong to strangers, they are fictions in law which are always accompanied with equity; (*c*) and in speaking of the relation of the act of bankruptcy, *Mansfield* C. J. says, It is in all cases extremely hard, in some cases shocking, and is not to be carried further than we are compelled. Is it not suffering then the

(*a*) Stra. 977.

(*b*) 1 Salk. 108. See *Prickett* v. *Down*, 3 Camp. 131. and p. 21. n. (*b*).

(*c*) 2 Ventris, 200.

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relation in this case to do wrong, to extend it to the case of an officer who is acting honestly and under perfect ignorance? And is this to be done to benefit those to whom some degree of negligence is to be imputed, inasmuch as they did not issue a commission immediately after the act of bankruptcy was committed? Let it not be said that the petitioning creditor might not know of the act of bankruptcy; for if his ignorance is to excuse him from the charge of negligence, why shall not ignorance equally excuse the sheriff? Let it be remembered too at what distance of time this action might, until the recent limitation, have been brought against the sheriff. The recent limitation has limited the period to two calendar months where there was no notice of a prior act of bankruptcy, but until that limitation (first introduced by 49 G. 3. c. 121. s. 2.) the time was indefinite, and the sheriff, if liable at all, might have been called upon years after his office had ceased. The hardship upon a plaintiff who had got the produce of the levy in his pocket would be great, but the hardship upon the sheriff would be much greater, and if, according to 3 *Coke* 29 *b.* relations are to extend only to certain persons, reason and justice would seem to require, in cases like the present, that the relation should be confined to the person for whom the execution was levied, and should not extend to the officer by whom it was ignorantly or innocently executed.

Let us then examine the cases and see whether they make any distinction between the plaintiff in the execution and the officer, and whether that distinction is confined to particular descriptions of actions, as actions of trespass, or whether it is not general, extending to every species of action, and including actions of trover and actions for money had and received.

The first case upon the point is *Bayly* v. *Bunning*. (*a*)

(*a*) 1 Lev. 173.

It was an action of trover against a bailiff, and the jury found a special verdict, that on the 6th *June* *J. S.* committed an act of bankruptcy; that on the 11th *June* *J. D.* sued out a *fi. fa.* against the goods of *J. S.* tested 4th *June*, under which defendant being a bailiff, seized the goods; that a commission of bankruptcy afterwards issued against *J. S.* and the goods were assigned by the commissioners to the plaintiff; and if *the taking* by defendant were lawful, they found for the defendant, otherwise for plaintiff. Two points were argued; one that the act of bankruptcy (which was 6th *June*) bound the goods and subjected them to the commission; for the stat. 21 *Ja.* 1. c. 19. s. 9. subjected all goods to the disposal of the commissioners, whereof execution was not served and executed before such time as the party shall become bankrupt, and here the act of bankruptcy was before the suing out of the writ. Secondly, the special conclusion (that is, if the taking be lawful) shall not hurt the plaintiff; for suppose the first taking was lawful (in respect that the writ should be supposed to have been sued out according to the teste, that is 4th *June*) yet execution was afterwards; and though the taking were lawful, the detention is illegal, and here a demand and refusal is found which make a conversion: (*a*) To which it was answered that if the writ could be alleged to have been sued out after the teste, yet *the bailiff should be justified*, for he cannot know what act of bankruptcy has been committed, or whether a commission will be sued out, and it is no return for him to say that the party is a bankrupt. *Windham* said, that notwithstanding the suing out of the writ, the goods were subject to

(*a*) A demand and refusal, though evidence of a conversion, cannot be taken upon a special verdict, as equivalent to a conversion; for the verdict must draw the conclusion and find the conversion, and the court cannot draw it for the jury.

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the disposal of the commissioners; but he and *Twisden* and *Keeling* held that the issue was found with defendant, for the taking by him was lawful by virtue of the writ; and afterwards, *Pasch.* 18 *Car.* 2. the judgment was given for defendant, he being an officer, obliged to execute the writ, who could not know of the act of bankruptcy, or whether any commission would be issued. This then is a case decided simply on the ground that the defendant was an officer, and that it was from that character and that alone that he was protected. The taking was alleged to be lawful upon two grounds, one that the goods were to be considered as bound by the teste of the writ which was before the act of bankruptcy, and therefore made the seizure lawful as to all the world; the other that it was lawful in respect of the character of the person by whom it was made; and the court disallowed the first ground and allowed the other. They considered that therefore to be lawful, in respect of the character of the officer, which, but for that character would have been unlawful, and would have amounted to a wrongful conversion. This case is also reported, 1 *Siderfin*, 271. and is there put simply upon the official character of the defendant. It was argued, *Siderfin* says, that defendant should not be found guilty, because he is a bailiff and has performed his duty, and has not converted to his own use, but he adds, "*Quære* hereof, for it was affirmed that the practice is that bailiff shall be found guilty if the party were then a bankrupt." However *Pasch.* 18. *Car.* 2. the court was clear that the bailiff was not guilty of the trover, but that the sheriff (as in this case is found) took the goods *lawfully*; and *Twisden*, J. said, relation to make trespasses has been strained, particularly in *Turner* and *Felgate's* case. That case is mentioned 2 *Sid.* 125, and 1 *Lev.* 95. It was trespass against the plaintiff in a cause where he had levied upon a judgment which had afterwards been set aside,

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and with reference to this case, *Twisden*, J. said, he was not satisfied with it to make a man a trespasser by relation and levying as this. Note, the action was against the *party*, not against the sheriff, who had the king's writ for his guarantee, which is sufficient for him; for in trespass and false imprisonment it is enough for him to plead the writ, but the party must plead not only the writ but the judgment. And note the difference between charging the officer and charging the party, for in *Bayly* v. *Bunning* the officer shall not be charged where perhaps the party shall. Again in *Phillips* v. *Thompson*, (*a*) the judges, in noticing *Bayly* v. *Bunning*, stated that it was resolved solely in excuse of the bailiff, who ought to be excused for executing the writ, and not on the ground that the goods were bound by the writ. It seems to us, therefore, that we are fully warranted in considering *Bayly* v. *Bunning* as having decided this point, that what in the case of an ordinary person would have been an unlawful taking, and consequently a sufficient ground for an action of trover would in the case of an officer be lawful, so as not to support an action of trover.

The next case is *Letchmere* v. *Thorogood*. (*b*) It was an action of trespass by the assignees of *Toplady* against the sheriffs of London and others for seizing goods under a *fi. fa.* against *Toplady* after an act of bankruptcy committed by him. The act of bankruptcy was committed on the 28th *April*, the seizure was on the 29th; the case was twice before the court, once in *Trinity* term 4 *Jac.* 2. of which 3 *Mod.* gives the account; and again, 1 *W.* & *M.* to which *Comberbach* and *Shower* refer. *Shower* says, "I now argued it again upon this point, that though by the statute of bankruptcy the property of the goods be vested in the assignees, yet this relation shall not work a wrong to make the officer a trespasser who had a good

(*a*) 3 Lev. 193.

(*b*) 3 Mod. 236. 1 Show. 12. Comb. 123. S. C.

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authority, and took goods lawfully;" and so in *Bayly* v. *Bunning*, the court was clear that the verdict was against plaintiff, entire damages being given, and that this action lay not against the officer, though trover would against the party. *Comberbach* says nearly the same: "The court were of opinion a construction should not be made to make the officer a trespasser by relation, for the taking was lawful at the time, and *Bayly* and *Bunning*'s case in *Siderfin* agrees."

Here then is another case in which a distinction is made between the officer and others, in which that which was considered an unlawful taking by others was considered lawful as to the officer, and where a verdict which might have been sustained as to the rest was held not sustainable as to him. This, however, was an action of trespass, and though there is no hint in the reports that the form of the action was the ground of the judgment, or that it would have been different had the action been trover, and though the form of action would have been equally a ground of defence for all the defendants, whether officers or not, yet we can in this case ascertain affirmatively that the form of the action made no difference, and that the judgment would have been the same had the action been trover. An action of trover was brought by the same plaintiff against the sheriffs the following year. It is reported 2 *Ventris*, 169. 1 *Shower*, 146. The sheriff pleaded the former action and verdict in bar, and upon demurrer the court is said to have held the plea good, because it appeared upon the record and the averments that the plaintiff was barred in the action of trespass upon the merits. *Ventris* says the case was adjourned; but *Shower*, who was counsel in the cause, and advised the plea, describes it as having been decided. His words are, "I did not argue this, because it was in the Common Pleas, but advised and drew the plea, and

so my poor widow was quit of them at law in both courts."

In *Cole* v. *Davis*, (*a*) *Holt* C. J. is said to have ruled that if *A*. be a bankrupt, and after the bankruptcy the sheriff, upon a *fi. fa.* against *A*., seize the goods and sell them, and a commission of bankruptcy is afterwards issued, and the goods are assigned by the commissioners, the assignees may maintain trover against the vendee; but *no action* will lie against the sheriff, because he obeyed the writ. In referring to this position in *Cooper* v. *Chitty*, as reported by *Blackstone*, (*b*) Lord *Mansfield* seems to impugn the authority of this note, but the only objection he makes to it is this, that Lord *Holt* is represented to have stated that no action would lie against the sheriff, without making a reserve for cases like *Cooper* v. *Chitty*, where the sheriff proceeded to sell after a commission issued and an assignment made.

This brings us to the case of *Cooper* v. *Chitty and another*. (*c*) It was trover by the assignees of *Wm. Johns* against the sheriff of *London*. The facts were these: On the 4th *November*, *Johns* committed an act of bankruptcy; on the 5th a *fi. fa.* issued against his goods, and the sheriff seized. On the 8th a commission issued, *Johns* was declared a bankrupt, and an assignment of his property was executed. On the 28th, the sheriff sold his goods. The seizure, therefore, was whilst the sheriff was ignorant of any bankruptcy, and the sale was after full notice; and the decision there, as it seems to us, was simply this—that the seizure, though after the act of bankruptcy, and therefore, independently of the character of the sheriff, an unlawful act, was in the case of the sheriff justifiable and excusable; but that the sale,

(*a*) Ld. Ray. 724. Hil. 10 W. 3.
(*b*) 1 Bla. R. 70.
(*c*) 1 Burr. 20. 1 Bla. 65. 1 Kenyon, 395.

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as being after full notice of the bankruptcy, was, even in the case of the sheriff, not justifiable nor excusable, but a wrongful act, and subjected him to an action of trover, not simply on the ground that he had committed a conversion, but on the ground that he had committed *what, even in his case,* was to be deemed a *wrongful* conversion. We are perfectly well aware, that in particular parts Lord *Mansfield* speaks of not making men *criminal* by relation—of not making them punishable by action or indictment as *trespassers;* but there are other parts of the judgment which appear to us to shew clearly, that by the expression of *criminals* and *trespassers,* he meant nothing more than *wrongdoers* generally, and that he never intended to have it understood that officers who made a mistake through unavoidable ignorance, who were acting innocently at the time, who did nothing but what was innocent, and in that sense *lawful,* were merely exempt from punishment as *criminals,* and from the action of trespass, but were nevertheless answerable to what would probably be nearly just as penal in its consequences, an action of trover. Unless he meant to convey the notion of perfect indemnity to the officer, where there was perfect ignorance, he made a very useless display of what would appear to be legal knowledge, and was filling up six pages with what might have been expressed in six lines. Had he meant that the sheriff, though a public officer, though acting ignorantly, though acting innocently, though acting in obedience to his writ, and though exempt from indictment or action of trespass, was nevertheless liable to an action of trover—why did he not say so at once? Why speak of a *wrongful* conversion, if any conversion was sufficient—why speak of selling *after notice* of the bankruptcy, and after the commission and assignment, if a sale *without notice,* and before the commission or assignment, would equally support the action of trover—

why say that the sheriff should not have *gone on* to a sale, after a full discovery that the goods belonged to a third person, (that is, the assignees,) if that *discovery* were immaterial? How, in commenting upon *Cole* v. *Davies*, could Lord *Mansfield* have said, that upon such a sale as there took place, (*i. e.* a sale before the commission,) *conversion* might have *been as excusable as the taking, because he obeyed* the writ, unless he had thought that, to make the sale by the sheriff a *wrongful* conversion, it was essential the sheriff should know of the bankruptcy at the time he sold? The hardship which he notices, if the sheriff were made a *trespasser* by relation, for taking goods where there had been a private act of bankruptcy perhaps many years before, applies equally if the sheriff is to be made a *wrongdoer* by relation, and therefore liable to an action of *trover* for selling goods; and how would his answer, that none of the reasons hold to justify him in selling the goods after a commission and assignment, be applicable, if a sale before the commission, and without any notice, would have been equally unjustifiable? How could he have made the observation, that there would scarcely ever be hardship upon the sheriff, where the taking and sale, or even the sale only, are subsequent to the assignment, had he had the notion in his mind that a sale before the assignment, before the commission, and before any knowledge of the act of bankruptcy, would make the sheriff liable to an action, to which his observations were directed? Does he conclude as if he had in his own mind, or meant to convey any such notion? "The commission and assignment are both notorious transactions; the seizure here is after the act of bankruptcy, and therefore after the property was by relation vested in the assignees, but that was *innocent* and excusable, and the sheriff shall not be liable by relation as a wrongdoer. The gist of this action is the wrongful conversion, by the sale

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and false return, long after the commission and assignment." He relies, therefore, upon the notoriety of the commission and assignment, and upon their being prior to the sale, and admits that the seizing was *innocent and excusable*, and yet in the form of action which he was considering, an action of trover, an unwarranted *seizure* would make a wrongful conversion wherever an unwarranted *sale* would. It appears to us, therefore, to be clear, that the principle upon which *Cooper* v. *Chitty* was decided, was, that the sale by the sheriff was a wrongful act, and that the reason why it was wrongful was, because it was after the *commission* had issued, and therefore after the sheriff ought to have concluded that there had been some prior act of bankruptcy. We have stated more of the judgment than we should otherwise have done, because of a passage in *Blackstone*'s report of the same case, and in deciding between his accuracy and that of Sir *James Burrow*, we thought it desirable that the tenor and scope of Lord *Mansfield*'s argument should be observed. Mr. J. *Blackstone*'s report (p. 69.) represents Lord *Mansfield* to have said, "But had the sale been *immediately after* seizure, still the sheriffs would have been liable:" as though Lord *Mansfield* had thought, that under a direction by the writ to make of the goods of *Johns*, &c. a *seizure* by the sheriff in ignorance would be excusable, a sale would not. But that this is a mistake in *Blackstone*, is, as it seems to us, clear, from what *Blackstone* represents to have been said by the Court in *Timbrell* v. *Mills*, Hil. 33 Geo. 2. and by the judgment of Lord *Mansfield* in *Aldridge* v. *Ireland*. (*a*) In *Blackstone*'s Reports, in the margin opposite the passage in question, is this minute: "*Timbrell* v. *Mills, contrà, Hil.* 33 Geo. 2." and in the report of *Timbrell* v. *Mills*, Blackstone 205, upon refer-

(*a*) East. Term, 24th G. 3. cited 1 Taunton, 273.

ence by counsel to the doctrine laid down in *Cooper* v. *Chitty*, the whole Court declared that it was allowed in that case, that if the sheriff levied the money, and paid it to the plaintiff before any commission issued, and without notice of the act of bankruptcy, he would at all events be safe.

In *Aldridge* v. *Ireland*, there were two points; one, whether trover would lie against the sheriff for seizing and selling the goods of a bankrupt, under a *fi. fa.* against a bankrupt, the goods having been duly taken by the sheriff, and sold by him before the commission. The sheriff was in fact indemnified, and therefore this point was not material. It was afterwards, however, insisted upon. Lord *Mansfield* observed; "If this were really the case of a sheriff who had acted fairly under a writ, *without notice of any act of bankruptcy*, there are several rules established in *Cooper* v. *Chitty for his protection*; and if he be not indemnified, it may be a ground for a new trial, because the whole proceeded upon that supposition." Is it probable that Lord *Mansfield* could have held this language—had the passage in *Blackstone* been correct, and had *Cooper* v. *Chitty* really decided that a sale by the sheriff, whether with knowledge of bankruptcy or without, was equally a wrongful conversion? We therefore conclude that *Cooper* v. *Chitty* decided only that a sale by the sheriff, *with notice of the bankruptcy*, was a wrongful conversion by the sheriff, and a sufficient foundation for an action of trover; but it left the case of the sheriff, upon a sale *without notice*, as much protected as before. In *Coppendale* v. *Bridgen and Another*, (*a*) the distinction is again made between the sheriff and the execution creditor, and the sheriff is considered excused where the execution creditor would be liable. It is not a decision upon the point, it is only

(*a*) Sheriff of *Middlesex*, Burr. 814.

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an authority from the *dicta* of the judges. It was an action against the sheriff as for a false return of *nulla bona* upon a *fi. fa.* against the goods of *Debonaire*. *Debonaire* was in prison for debt from the 2d of *May* to the 5th of *July*, on which day (*i. e.* 5th of *July*) a commission issued against him. In the interim, *viz.* 18th of *June*, the sheriff seized his goods under the *fi. fa.* in question, which issued 17th of *June*, and was returnable on the 26th. The return was not made till the 5th *November*, and as *Debonaire* was then unquestionably a bankrupt, and had been so by relation from the beginning of *May*, the Court considered the return true, but they nevertheless looked at what would have been the state of things, had the return been made at the return of the writ, *viz.* the 26th *June*, and what would have been the respective conditions of the execution creditor and the sheriff. Lord *Mansfield* said—"Had the sheriff returned on 26th *June*, that he had levied and paid over, *he would have been excused*, for he could not then have known that *Debonaire* would lie two months in prison, and was therefore under invincible ignorance as to that event; but *plaintiff would have had no advantage, he would have been liable to refund*, though the sheriff might have been *excusable* in paying him." *Denison* J. said, "Had he made such retnrn, &c. *perhaps* he might have been justified, yet the plaintiff must have refunded;" and *Wilmot* J. added, "*No doubt the assignees might have recovered the money from plaintiff.*" This, though it is an authority, as far as it goes, in favour of the defendant, is by no means so strong as the other cases we have mentioned; and we only notice it, that it may not appear to have been overlooked, and to shew, that though the judges were clear there would be a relation back as *against the execution creditor*, they did not express a similar opinion *as to the sheriff*. The

next case in order of time is *Hitchin* v. *Campbell*, (*a*) in which there certainly is an *obiter dictum* which may be considered as making against the sheriff, but it is an *obiter dictum* only, and by no means called for by the judgment given. It was an action by the assignees of *Anderson*, a bankrupt, against an execution creditor, for money had and received, to recover the amount of a levy upon a *fi. fa.* against *Anderson*. There were two questions—one, whether the action for money had and received lay against the execution creditor. The Court held it did. The other, whether a former verdict and judgment for the defendant and the sheriff, in an action of trover for these goods, was a bar. The Court held it was. *Blackstone's* Report, p. 829. represents *De Grey*, C. J. to have said, "Notwithstanding the transfer of the property by relation, the sheriff is certainly *no trespasser by taking* the goods in execution after the act of bankruptcy, and before the commission." It was so ruled in *Letchmere* v. *Thorogood*, in *Comberbach* and *Shower*, and in *Cooper* v. *Chitty*, Burr. 20.; but by selling, the sheriff converts the goods, and then trover is maintainable against the sheriff or his vendee, or the plaintiff in the original action." *Wilson* represents the Court to have said, "We are of opinion that the plaintiff having brought trover against the sheriff and the now defendant, (which action well lay,) have made their election, and are barred by their former verdict and judgment." The only expressions which can be considered as bearing against the sheriff is that in *Blackstone*, "by selling, the sheriff converts the goods, and then trover is maintainable against the sheriff," &c. and that in *Wilson*, "*which action* well lay"—but we think it would be too strong an inference to draw from these expressions, that the sheriff was at all events liable, though he sold un-

(*a*) 2 Wils. 304. 2 W. Bla. 827. Lofft. 208.

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der an ignorance of the bankruptcy, or that they meant to carry his liability beyond the extent of the former decisions. This brings us to the case of *Smith* v. *Mills*, (*a*) which was in all respects similar to *Cooper* v. *Chitty*, except that the action was *trespass*, not trover. The seizure there was after the act of bankruptcy, but before the commission, and the sale long after the commission and assignment. The act of bankruptcy was on the 1st *February*, and the seizure on the 23d; the commission on the 27th, the assignment on the 28th, and the sale on the 13th March. There was no doubt, therefore, that there was not merely a conversion, but a wrongful conversion, or conversion after knowledge of the bankruptcy; so that upon the principles of *Cooper* v. *Chitty*, trover would immediately have lain. The question was, whether the action of trespass, which was for the seizure, was maintainable. *Ashurst* J., who delivered the opinion of *Buller* J. as well as his own, says, "I know no instance where a man has a new right given him, which from reasons of policy is so far made to relate back as to avoid all mesne incumbrances, should be taken to have such a possession as to bring trespass for an act done before such right was given him." But at all events the rule will hold with respect to *officers and ministers of justice*, and he instances *Letchmere* v. *Thorogood*, (referring probably to the action of trespass,) and *Bayly* v. *Bunning*, which was trover. He adds, in *Cooper* v. *Chitty*, "Lord *Mansfield* lays down the true ground of distinction between trover and trespass as applied to this case; the plaintiffs, therefore, are not injured, as they may recover the value of the goods in trover." What then is the ground of distinction between trover and trespass, as applied to *Smith* v. *Mills*, laid down by Lord *Mansfield* in *Cooper* v. *Chitty*—what

(*a*) 1 Term Reports, 475.

but this? That a seizure after an act of bankruptcy, though not lawful as against the execution creditor, is *excusable* as against the sheriff, if made in honest ignorance by him, and cannot be made the subject of an action of trespass (or of any other action) against him; but that if he be afterwards guilty of a *wrongful* conversion, *i. e.* a conversion after notice of the bankruptcy, though this will not make him a trespasser by relation, a trespasser *ab initio*, or make his *taking* unlawful, it will make him answerable for that conversion in an action of trover. *Smith* v. *Mills*, therefore, recognizes the distinction between an *officer and minister of justice, and other persons;* it refers to one of the instances in which that distinction was allowed in an action of trover, *viz.* *Bayly* v. *Banning*, and appears to us to leave the sheriff in the situation in which *Cooper* v. *Chitty* left him. In *Vernon* v. *Hankey*, (*a*) *Buller* J. notices the protection to which sheriffs, as ministers of justice, are entitled; and takes the distinction in cases in which they act in honest ignorance, from those in which they have notice, thus:—"The Courts have said that sheriffs, being *ministers of justice*, are entitled to the protection of the Courts, if they act honestly; but it has always been held as clear law, that if a sheriff, after *notice of bankruptcy*, proceed to levy, though no commission be then taken out, he must do it at the peril of answering to the assignees."

Thus stood the authorities till 1807, when the case of *Potter* v. *Starkie* (*b*) was tried before *Wood* B. at *Lancaster* assizes, on the first circuit that able judge ever went. It appeared in evidence, that on the 1st of the month a *fi. fa.* against *J. S.* was delivered to the sheriff; on the 2d, *J. S.* committed an act of bankruptcy,

(*a*) 2 Term Rep. 122.

(*b*) 4 M. & S. 260. Selw. Prac. 8th Ed. 1431.

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and that on the 3d the sheriff seized. *Wood* B. held the sheriff liable. *Richardson* obtained a rule *nisi* for a new trial, and cited *Cooper* v. *Chitty*, and *Timbrell* v. *Mills*, and insisted that the ground of decision was, that the sale was after assignment. *Williams*, *contrà*, insisted that the sheriff had taken not the goods mentioned in the writ, *i. e.* the goods of *J. S.*, but the goods of other persons, and that he was therefore guilty of a conversion, the court were of that opinion and discharged the rule, and the ground of the decision (as *Richardson* J. is represented (*a*) to have stated) was that according to *Cooper* v. *Chitty*, the property must be considered as divested by the bankruptcy. This account is from *Selwyn's* Nisi Prius, 1431. The same case is also cited 4 *Maule* and *Selwyn*, 260, where the statement is, the court held the sheriff liable in trover, "though he seized, sold, and paid over the money before any commission issued, and before any notice, saying this necessarily followed from *Cooper* v. *Chitty*, for it was an unlawful interference with another's goods." It is obvious to remark that neither *Bailey* v. *Bunning*, *Letchmere* v. *Thorogood*, *Cole* v. *Davies*, or *Aldridge* v. *Ireland* were cited; the distinction between the officer, who is a minister of justice, and therefore forced to act, and the execution creditor for whose benefit the officer acts, and who alone has the fruits of the execution, was not brought under the notice of the court, and upon the sole authority of *Cooper* v. *Chitty*, and the doctrine of relation there established, *i. e.* a relation which binds the execution creditor in all cases, and the sheriff when he has notice of the bankruptcy, the case was decided against the sheriff. The next case in order of time is *Wyatt* v. *Blades*, (*b*) 3rd *June*, 1813. The act of bankruptcy there was 8th *Dec.* The sheriff seized under a *fi. fa.* on

(*a*) See *Price* v. *Helyar*, 4 Bing. 602.

(*b*) 3 Camph. 396.

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8th *Feb.* and removed the goods; on 12th *Feb.* a commission issued, and the sheriff had notice not to sell. He acquiesced in that notice and did not sell, notwithstanding which the assignees brought trover against him. The only point stated to have been raised, was whether there had been a conversion; and Lord *Ellenborough* held the removal of the goods a sufficient conversion. Upon this statement it is so doubtful whether the point now under consideration was ever raised, or if raised, what was Lord *Ellenborough's* opinion upon it, that we think no material stress can be laid upon it.

The next case is *Lazarus* v. *Waithman.* (*a*) It was trover against the sheriffs of London for seizing and selling under a *fi. fa.* against *Jackson.* The seizure was on the 15th *Nov.* the sale 21st *Dec.* but *Jackson* had committed an act of bankruptcy on the 6th *Nov.* and the commission issued on the 23d *Dec.* The assignment was not executed till 6th *Jan.* There was a verdict for the plaintiff and a motion for a new trial, simply on the ground that the sale was before the assignment. Under what circumstances the sheriff sold, whether he knew of the act of bankruptcy, whether he was indemnified or not, are points upon which the report is silent. The single ground mentioned for the motion is that the sale was before the assignment. And this was clearly no ground; for the assignment, at whatever time made, would relate back to the time when the act of bankruptcy was committed, and so as the assignees brought trover, not trespass, would support an action for a wrongful sale. *Dallas* C. J. thought the distinction between trespass and trover clearly laid down in *Cooper* v. *Chitty* and recognized in *Smith* v. *Milles.* *Park* J. thought the ground of the motion untenable unless the decision in *Cooper* v. *Chitty*, and all the cases governed by it

(*a*) 5 B. M. 313, Easter Term, 1821.

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were to be overturned. *Burrough* J. said the point was settled long before he knew *Westminster* Hall. *Richardson J.* is more minute. "It has long been settled, (he says) that if the sheriff seize after an act of bankruptcy, but before a commission, and sells after it is issued, the assignees may bring trover against him. In *Lyon* v. *Lamb*, (which is another name for *Potter* v. *Starkie*,) (*a*) the sheriff sold, before any intimation that any act of bankruptcy had been committed, and it was insisted that *that* distinguished it from *Cooper* v. *Chitty*; but the Court of Exchequer held that the property was changed and vested in the assignees by relation from the time that the act was committed. So here, though the defendants might not have known a commission was about to issue at the time of the seizure, it forms no excuse for them for having afterwards proceeded to a sale.

Now the utmost extent to which that case goes, and we are willing to allow it that extent, is, that it goes as far as *Potter* v. *Starkie* did, but it is also open to the observations to which that case was exposed, viz. that it was founded altogether upon *Cooper* v. *Chitty*, that none of the earlier cases were mentioned, that the distinction between the sheriff and the execution creditor was not noticed, and that the light reflected upon *Cooper* v. *Chitty* and *Aldridge* v. *Ireland*, is not brought under the attention of the court.

The last case we shall state at any length is *Price* v. *Helyar*. (*b*) It was trover against the sheriff by the assignees of *Latham*. The levy was in *Nov.* 1826, and the money was paid to the execution creditors in that month. There had been acts of bankruptcy in *August*, *Sept.* and *Oct.* but no commission issued until 11th *Jan.* 1827. Neither the sheriff nor his officers knew of any

(*a*) See 1 M. & P. 557. n.

(*b*) East. T. 1828. 4 Bing. 597. See also the cases cited in *Glaspoole* v. *Young*, 9 B. & C. 700. as contrary to *Price* v. *Helyar*.

act of bankruptcy till 18th *Jan.* 1827. For the assignees no case was cited on the point, but *Potter* v. *Starkie*, *Cooper* v. *Chitty* and *Smith* v. *Mills*. Defendant cited no case except *Lee* v. *Lopez*. The court took time to consider, and *Best* C. J. delivered the opinion of the court; he said they were desirous to enquire about *Potter* v. *Starkie*, and they found from Mr. J. *Richardson* that the report in 4 *Maule* and *Selwyn* was correct, that the Court of Exchequer did decide in the manner there stated, and gave the reason there assigned, *i. e.* that the case depended upon *Cooper* v. *Chitty*, and we think, said he, that *Cooper* v. *Chitty* embraces the principle on which we now decide. He then gives his reasons for considering the passage we have noticed in *Blackstone*'s Reports as correct, and points out particular points even of the report in *Burrow*, which appear to him to justify the conclusion he adopts. We forbear examining his reasoning, because we have already fully detailed the grounds upon which our deduction from *Cooper* v. *Chitty* is founded, and that detail makes it unnecessary we should comment upon any thing he has said; we will, however, make this observation, that we think it unfortunate the earlier cases were not brought under the consideration of the court, and the distinction they establish between the officer and the execution creditor pointed out; because we feel convinced the court would have appreciated its weight, and we think it not improbable it might have led to a different conclusion.

The cases of *Carlisle* v. *Garland*, (*a*) and *Dillon* v. *Langley* in B. R. (*b*) are undoubtedly additional authorities in support of the cases of *Potter* v. *Starkie*, *Lazarus* v. *Waithman*, and *Price* v. *Helyar*; but as they are founded wholly upon those cases, and the distinction we have just mentioned was not mentioned in either of them, we

(*a*) 7 Bing. 298. (*b*) 2 Bar. & Adol. 131. Easter, 1831.

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think they do not carry with them the weight to which a deliberate judgment by either of these courts upon discussion and a full consideration of the subject, and a view of all the authorities, would deservedly be entitled.

Upon the whole, therefore, upon the grounds that *Bayly* v. *Bunning*, *Letchmere* v. *Thorogood*, and *Cole* v. *Davies*, establish a distinction between the case of the sheriff and that of an execution creditor—that that distinction is supported, not impugned by *Cooper* v. *Chitty*, that it is mentioned with approbation in several cases, and not impeached in any, and that it was entirely overlooked in *Potter* v. *Starkie*, and the subsequent cases, we are of opinion that the defendant *Jewison* is entitled to the benefit of it in this case, and that as to him, there ought to be judgment for the defendant.

Judgment for defendant *Jewison* and against defendant *Ingham*.

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REX in aid of HOLLIS *against* BINGHAM.

After traverse of an extent in aid, the prosecutor and defendant agreed to refer to arbitration the amount of the debt due to the former; and an award was made for payment of money by defendant to the prosecutor: before which, however, the defendant was discharged under an insolvent act, having inserted this debt in his schedule. The crown being no party to the reference, the award was set aside, and the insolvency was held to exonerate the defendant from liability to an attachment for not performing it.

*MANNING* in *Trinity* Term obtained a rule for an attachment against the defendant for non-payment of 861*l.* found by award to be due from the defendant to *Hollis*, the prosecutor of the extent in aid. [See the facts, ante Vol. I. 262.] Cause was shewn, but the court enlarged the rule till the 10th day of Michaelmas Term, in order to the defendant's making an affidavit of

his discharge under an insolvent act, and gave leave to move to set aside the award within the same time. (*a*)

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*Follett* obtained a rule accordingly on several grounds, that which became material being, that after the order of reference and award made, the defendant was discharged under the insolvent debtors' act then in force, 1 G. 4. c. 117.

*Manning* shewed cause against the rule for setting aside the award. This extent in aid was properly issued by *Hollis* before 57 G. 3. c. 117. But is the defendant exonerated from proceeding in the reference by his discharge in 1822, under 1 G. 4. c. 119. the insolvent act then in force? The award was made after the discharge. Had this been an action of debt or assumpsit by *Hollis*, to recover money from the defendant, in which, after order of reference made, the defendant's property had passed to an assignee of insolvents, the submission might have ceased to be mutual, and *Hollis* as a mere plaintiff might have refused to proceed in the reference. *Marsh* v. *Wood.* (*b*) But that case does not decide that bankruptcy or insolvency in general revoke a submission to arbitration; and here *Hollis*, as prosecutor of an extent in aid, sues by prerogative process for a debt to the crown, which was expressly excepted from the operation of the insolvent act. (*c*)—[*Bayley* B. This ex-

(*a*) So in K. B. where it is usual after a rule for an attachment is moved for, to oblige the party objecting to the award to move to set it aside, *unless* the objections appear on the face of it. Both rules then come on together, and the objections to the award being stated in the latter rule (see *Reg. Gen.* Vol. I. Appendix, p. xv.) subject to the above qualification, the party supporting the award has an opportunity of answering them. *Henfree* v. *Bromley*, 6 East. 310. cited Tidd, 9th Edition, 845.

(*b*) 9 B. & C. 659.

(*c*) 1 G. 4. c. 119. §. 40. See *West* on Extents, 95. So now by 7 G. 4. c. 57. §. 12. (continued indefinitely by 11 G. 4. and 1 W. 4. c. 38) Except by consent of three commissioners of the treasury, §. 74. And by § 75. pri-

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tent in aid only finds a debt from the defendant to *Hollis*, though the seizure was for a debt due to the crown. The debt to the crown must be presumed to have been satisfied, for no such debt is sworn by *Hollis* to exist. Then how can *Hollis* rely on the rights of the crown in respect of a crown debt?]

In *Rex* v. *Pixley* (*a*) a surety for a government clerk, who was obligor of a bond to the crown, conditioned for his duly accounting, became bankrupt, obtained his certificate, and when afterwards arrested on the bond, relied on it for his discharge. But the court refused to discharge him, saying the statutes of bankrupt did not bind the crown, and that it had been ruled so not only in case of an extent, but even of an extent in aid.

[*Bayley* B. That was a case of an extent in chief, and the suit against the surety would imply that a debt to the crown from the principal existed unsatisfied.]

By 57 G. 3. c. 117. § 6. the act for regulating extents in aid, the Court of Exchequer is expressly empowered to discharge insolvent persons imprisoned under extents in aid, which shews that such extents are not affected by the common insolvent debtors' acts.

When *Hollis*'s debt to the crown was ascertained by inquisition, the debt from defendant to *Hollis* was seized into the crown's hands by operation of law, so as to become a crown debt. Though the *amoveas manus* (*b*) is a discharge *pro tanto*, it is not like an entry of satisfaction on the record, nor does it annul that seizure, or revest the property in the extendee, or avoid the recognizance, which by inquisition found, is a matter of record.

soners under any *capias* or *extent* issued to reimburse any sureties, &c. who have paid a prisoner's debt to the crown, can only be discharged from custody by the Court of Exchequer.

(*a*) Bunb. 202. and see Anon. 1 Atk. 262. *West* on Extents, 95.

(*b*) An *amoveas manus* was one of the conditions on which the recognizance to refer was entered into.

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*Dampier* and *Follett* in support of the rule.—The defendant by his discharge under the insolvent act is exonerated from liability to perform this award. In *Marsh* v. *Wood* the bankrupt might have been afterwards enabled to perform the award, but this is a stronger case, for the insolvent swears he has no power over the subject matter of seizure (*a*). The crown has no present interest. Had there been judgment on the extent it might have been otherwise, but the present is a proceeding on a reference to which the crown is no party, to recover a private debt from the defendant to *Hollis*, and as such is answered by the defendant's discharge under the insolvent act. This debt was inserted in the schedule, and *Hollis* opposed his discharge from it.

Lord LYNDHURST C. B.—This is an application to set aside an award which by private arrangement has resulted from the prosecution of an extent in aid, issued against the defendant to enable *Hollis* to perform his engagements with the crown. In the course of that proceeding the prosecutor took upon him to consent to refer to arbitration the amount of the debt due to him from the defendant. The crown being no party to that reference, the defendant's insolvency discharges him from liability for what was so done without its intervention: the effect of which is, that the award is vacated.

BAYLEY B.—As the crown is not a party to the agreement for reference, this transaction is between the prosecutor and the defendant as subject and subject. Then considering the case as between individuals, the circumstance of insolvency has intervened to destroy the debt due from one to the other. By setting aside this award we only put the parties in the same condition in which

(*a*) See 7 G. 4. c. 57. § 57—62.

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they were when the property was seized by the crown for the security of *Hollis*'s debt to it. When a debt (from a subject to a subject) has been seized on an extent in aid into the hands of the crown, and proceedings take place, which as between the parties themselves, would have barred the debt itself, there is no authority to shew that that result shall not still happen, where it does not appear that the crown debt is not satisfied.

GARROW B. concurred.

BOLLAND B.— We are to look to the operation of the insolvent act as between these parties, considered as private individuals, the one claiming, the other repudiating a debt. We are not called on to decide on any future rights of the crown, or of the prosecutor, respecting the crown debt.

Rule absolute to set aside the award.
Rule for attachment discharged.

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THE ATTORNEY GENERAL *against* RANDLE JACKSON *and* WILLIAM JACKSON.

A testator devised hereditaments to *R. J.* and *W. J.* and their heirs to hold to their use during the life of *C. T.*, and declared that after the death of *C. T.* they and their heirs should stand seised to the use and intent that *J. T.* should, during his life, receive out of the said hereditaments and the rents thereof, an annuity or clear yearly rentcharge of 500*l.* payable quarterly, the first payment to be made on such quarter day as should next happen after the death of *C. T.*, with power of distress and entry; subject to which annuity he gave one moiety of the hereditaments in fee to *R. J.* and the other for life to *W. J.* Held, that this was a "gift by way of annuity out of, or charged on real estate," subjected to legacy duty by 55 G. 3. c. 184. Sched. Part III., and to be paid in the first instance by *R. J.* and *W. J.*

THIS was an information filed by his Majesty's Attorney General against the defendants, to recover the sum of 97*l.* 13*s.* for certain legacy duty, charged in the said information to be due to the crown from the defendants. Upon the trial before Lord *Lyndhurst*, at the *Westminster* sittings after *Trinity* term 1831, a ver-

dict was taken for the crown by consent for the above sum, subject to the opinion of the Court upon the following case:—

The testator, *Samuel Jackson*, made his will and testament in writing, bearing date 31st *May* 1823, and thereby gave, devised, and bequeathed unto the defendants, and their heirs, certain freehold hereditaments and premises therein particularly mentioned; and all and singular other the freehold and copyhold messuages, lands, and tenements, wherever situate (not being rent-charges for life or lives), with their rights, members, and appurtenances, to hold the same hereditaments unto the said defendants and their heirs, to the use of the said defendants, their heirs and assigns, during the life of *Charlotte Troughton*, wife of *Joseph Troughton*, of, &c. upon trust to preserve the contingent remainders thereinafter limited; and also upon certain trusts therein mentioned, during the life of the said *Charlotte Troughton*: And from and after the decease of the said *Charlotte Troughton*, the said testator declared that the said defendants and their heirs should stand seised of the said hereditaments, to the use and intent that the said *Joseph Troughton* should, during his life, receive, by and out of the said hereditaments and the rents thereof, one annuity or clear yearly rent-charge of 500*l.*, clear of taxes, and without any deduction or abatement whatsoever, to be payable quarterly, on the usual feast days for payment of rent; the first quarterly payment to be made on such of the same feast days as should next happen after the decease of the said *Charlotte Troughton*; with such powers and remedies of distress and entry, and perception of rents, in case the said annuity of 500*l.* should be in arrear, as are reserved to lessors for the recovery of rents on leases for years. Proviso, that in case, by means of the said *Joseph Troughton* becoming a bankrupt before or after the decease of said

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testator, or taking the benefit, before or after the decease of said testator, of any then present or future act or acts of parliament for the relief of insolvent debtors, or executing or entering into any deed or agreement, or doing or committing any act or default, the said yearly rent charge of 500*l.* or any part thereof should, or but for that clause would, be conveyed, assigned, charged, or incumbered, then and in any of such cases, the said yearly rent charge of 500*l.* thereinbefore limited to the said *Joseph Troughton*, should thenceforth cease and be void. And from and after the decease of the said *Charlotte Troughton*, but subject and without prejudice to the said annuity or yearly rent charge of 500*l.*, the said testator declared that the said defendants, their heirs and assigns, should stand seised of the said hereditaments so devised to them, in trust as aforesaid, to the use of the first and other sons of the body of the said *Charlotte Troughton*, severally, successively, and in remainder, one after another in tail male; remainder to the use of the daughters of the body of the said *Charlotte Troughton*, in equal shares as tenants in common in tail, with cross remainders between them in tail, in case there should be a failure of issue of the body or bodies of any or more of such daughters; and if all such daughters but one should happen to die without issue, or if there should be but one such daughter, then to the use of such one or only daughter in tail, and for default of such issue, then to the uses following, *viz.* *As to one moiety of the said hereditaments, to the use of the said defendant* Randle Jackson, *his heirs and assigns for ever; and as to the other moiety, to the use of the defendant* William Jackson *and his assigns, for his life; remainder to the use of the said defendant* Randle Jackson, *and his heirs, during the life of the said defendant* William Jackson, *in trust to preserve the contingent remainders; remainder to the use of the first and other sons of the body of the said* William Jackson lawfully begotten, succes-

sively and in remainder, one after another in tail male; remainder to the use of all the daughters lawfully begotten of the body of the said *William Jackson*, in equal shares, as tenants in common in tail; with cross remainders between or among such daughters in tail, and for default of such issue, then to the uses following, *viz.* to the use and intent that *Henry Johnson* and *Robert Johnson*, therein mentioned, and their heirs and assigns, might receive out of the same moiety one annuity or yearly rent charge of 600*l.*, to be issuing out of and charged upon the said moiety, and to be payable quarterly as therein mentioned, with full powers of entry and distress and perception of the rents, in case the said annuity should be in arrear, and subject thereto, to the use of the said defendant *Randle Jackson*, his heirs and assigns for ever. But in case the said *Randle Jackson* should die in his, the testator's, lifetime, then to the uses in the said will mentioned. And the said testator directed, that the said *Henry Johnson* and *Robert Johnson*, their heirs and assigns, should stand seized of the said annuity or yearly rent charge of 600*l.* upon the trusts following: as to one equal fourth part thereof, upon trust for *Henry T. Wright*, during his life, and after his decease, upon trust for all and every the children of his body lawfully begotten, as tenants in common in tail, with cross remainders between or among such children in tail; and for default of such issue, then upon the same trusts as are therein declared concerning the three other undivided fourth parts.

Power for the trustees, at their discretion, during the minority of the said *H. T. Wright*, to apply the said fourth part towards his education and advancement in life. Proviso, that if said *H. T. Wright* should convey, or agree to convey, or incumber the said fourth part, or do any act whereby to assign or incumber the same by operation of law, then the said fourth part should, during the life of the said *H. T. Wright*, be held in trust

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for the said *Randle Jackson*, his heirs and assigns; and upon similar trusts as to the remaining three fourth parts, for *T. G. W.*, *M. A. T. W.*, and *W. W.*, and failure of such issue as aforesaid, of their respective bodies, then, as to and concerning the said annuity or yearly rent charge of 600*l.*, in trust for the said defendant *Randle Jackson*, his heirs and assigns for ever.

And in subsequent parts of his will, the testator gave sundry legacies and annuities, upon which the duty was duly paid.

The testator, *Samuel Jackson*, died in *March* 1825, seised of the estate devised by his will. *Charlotte Troughton*, mentioned in the will of *Samuel Jackson*, died in the month of *August* 1829, *without having had any issue.* Defendants are, and have been, since the death of the said *Charlotte Troughton*, seised in possession, according to the estates limited to them respectively by the will of the said *Samuel Jackson*, and *Joseph Troughton*'s rentcharge was regularly paid from the death of his wife, the said *Charlotte Troughton*, to the time of filing the information, at the times in which the same was required to be paid by the said will, by the cheques of the defendants, to prevent the necessity of compelling the said *Joseph Troughton* to have recourse to the remedies given him by the will, and thereby incurring expence which would fall upon the estate. The annual profits of the estate devised by *Samuel Jackson* exceeded 500*l.* The said *Joseph Troughton*, at the time of the death of the said *Charlotte Troughton*, was of the age of forty-one years, and is a descendant of a sister of the grandfather of the deceased *Samuel Jackson*, and according to a calculation agreed to on both sides, the value of 500*l.* for the life of *Joseph Troughton*, calculated as an annuity, according to stat. 36 Geo. 3. c. 52. is 6,509*l.*, the duty on which, calculated as aforesaid, was agreed to be the sum of 390*l.* 11*s.* 10*d.*, and the first instalment of the legacy duty payable on such an an-

nuity 97*l.* 13*s.*, the time for payment of which, if the same should be payable as alleged in the information, was expired.

The questions for the opinion of the Court were—

1st, Whether the interest or benefit passing by the will of the said *Samuel Jackson* to the said *Joseph Troughton*, is subject to duty within the meaning of the several statutes relating to the legacy duty?

2dly, Whether the defendants in the information are the parties liable to the crown for the payment of such duty, if any be payable?

3dly, Whether the defendants are liable to the payment of such duty upon the information, which charges them as jointly liable?

4thly, Whether either, and if either, which defendant is liable to the payment of such duty upon the information, and the issues joined upon the pleas thereto?

If the Court should decide the affirmative of all the three first questions, the verdict of the crown to stand. If the Court should decide the affirmative of the last question, then the verdict to be altered accordingly. If the Court should decide the negative of the first question, or of the second and fourth, or third and fourth, the verdict of the crown to be set aside.

Either party to be at liberty to refer to the information and issues, and to turn the special case into a special verdict. (*a*)

*Amos* for the Crown.—The rent charge or annuity given to Mr. *Troughton* was liable to legacy duty, being a legacy out of or charged upon the testator's real estate, within 55 G. 3. c. 184. Schedule, Part III. tit. *Legacy*. The first clause of Article 2. of that schedule is, "For every legacy, specific or pecuniary, or of any other description, of the amount or value of 20*l.* or upwards,

(*a*) See *Attorney General* v. *Dimond*, Vol. I. p. 286.

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given by any will or testamentary instrument of any person who shall have died after 5th *April* 1805, either out of his or her personal or moveable estate, *or out of or charged on his or her real or heritable estate, or out of any monies to arise by the sale, mortgage, or other disposition of his or her real or heritable estate, or any part thereof*, and which shall be paid, delivered, retained, satisfied, or discharged after 31st *August* 1815"—or by another clause in the same article—" *All gifts* of annuities, or *by way of annuity, or of any other partial benefit or interest*, out of *any such estate* or effects *as aforesaid*, shall be deemed 'legacies' within the intent and meaning of this schedule." It is so liable, as "a gift by way of annuity, out of a real estate," or as "a gift of a partial benefit or interest out of a real estate." First, on the precise wording of the enactments:—The first clause distinguishes the cases where the legacies are charged out of the real estate, and where real is to be converted into personal estate. The table for calculating annuities, annexed to 36 G. 3. c. 52. is adopted b 55 G. 3. c. 184. s. 8. Before 36 G. 3. c. 52. no legacy duty was payable on any profit out of, or charge upon, land; nor does that act alter the law as far as the profit, &c. is satisfied out of the land; but s. 7. (*a*) shews the legislature at that time contemplated the nature of these charges, though then imposing no duty on them.

(*a*) 36 G. 3. c. 52. § 7. Enacts that any gift by any will or testamentary instrument of any person dying after the passing of this act, which shall by virtue of such will or testamentary instrument have effect, or be satisfied out of the personal estate of such person so dying, or out of any personal estate which such person shall have power to dispose of as he or she shall think fit, shall be deemed and taken to be a legacy within the intent and meaning of this act, whether the same shall be given by way of annuity, or in any other form, *and whether the same shall be charged* only on such personal estate, *or charged also on real estate* of the testator or testatrix, who shall give the same, except so far as the same shall be paid or satisfied out of such real estate, in a due execution of the will or testamentary instrument by which the same shall be given.

By 45 G. 3. c. 28. § 4. (*a*) benefits of a similar nature to that here acquired by *Troughton*, were made subject to legacy duty. Under that section a rentcharge might be "*payable* out of" real estate, where the money was to be received by trustees and handed over, but the more general expression "out of," in 55 G. 3. c. 184. Schedule, Part III. Art. 2. clause 1. would include a case where a person had a right in the first instance to take it out of the realty without intervention of any hand to deliver it over to him.

The clause of 55 G. 3. c. 184. Sched. secondly above cited, does not occur in 45 G. 3. c. 28. and was taken from 48 G. 3. c. 149. On general reasoning these rent charges, though grantable in fee or in tail, are usually inserted to serve a temporary purpose; for it usually happens that the grantee has no permanent estate in, never comes on, or has any thing to do with the land, but has a claim on the testator inferior to that of the person interested in it. Then *ad ea quæ frequentius accidunt jura adaptantur*, and the legislature has not distinguished annuitants taking by personal legacies from those taking no permanent interest in the land.

Secondly, Assuming this rentcharge is subject to duty, the defendants who are seised in moieties, one in fee and the other for life, with remainder over, are properly so

(*a*) Enacting that every gift by any will or testamentary instrument of any person dying after the passing of this act, which by virtue of any such will or testamentary instrument, shall have effect or be satisfied out of the personal estate of such person so dying, or out of any personal estate which such person shall have power to dispose of as he or she shall think fit, or which shall have been charged upon or made "*payable* out of" any real estate, or be directed to be satisfied out of any monies to arise by the sale of any real estate of the person so dying, or which such person may have the power to dispose of, whether the same shall be given by way of annuity, or in any other form, shall be deemed and taken to be a legacy within the true intent and meaning of this act.

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charged, as tenants in common. By 45 G. 3. c. 28. § 5. (*a*) the duty is charged on the legacy, (*b*) and is payable by the person who takes the estate, subject to the annuity, he usually receiving the profits in the first place. That may be unreasonable between heir and annuitant, and perhaps the heir need not pay the annuity plus the legacy duty.

[*Bayley* B.—On the death of *Charlotte Troughton* without issue, the defendants are to stand seised of the premises, to the use and intent that *Joseph T.* should during life receive an annuity. The usual powers of distress and entry, and perception of rents, given to *Joseph T.* do not take place immediately on the death of *Charlotte T.* but after arrears accrue. Though *Joseph T.* is "to receive," yet as the first quarterly payment is to be "made to" him, that implies that some other is to receive and to pay him. The other person must be the trustee and must have the legal estate.]

Whether defendants have the legal estate as trustees, or are merely parties interested in the profits, having the estate taken out of them by the statute of Uses, they are within the act.

3rdly, If the defendant *Randle* having the fee is alone liable, is he chargeable under this information, so as to bar a future information against him alone? But this proceeding is bottomed, not on contract, but on duty, a

(*a*) Enacting that the duties hereby granted on legacies charged on or made payable out of any real estate, or out of any monies to arise by the sale of any real estate, or upon residues, or parts or shares of residues, or of any such monies, shall be accounted for, answered and paid by the trustees or trustee to whom the real estate shall be devised, out of which the legacy or legacies, or share or shares of any money arising out of the sale or mortgage, or other disposition of such real estate shall be to be paid or satisfied, or *if there shall be no trustees, then by the person or persons entitled to such real estate, subject to any such legacy.*

(*b*) And see *Waring* v. *Ward*, 5 Ves. 670. and see 6 Ves. 520.

principle stated in *Bastard* v. *Hancock*, (*a*) and acknowledged in *Hardyman* v. *Whitaker*. (*b*) *Bastard* v. *Hancock* was debt against three defendants, on a penal statute for not setting out tithes; the jury found *nil debet* as to one, but the court held that a verdict should pass against the others, because the claim was not in substance a debt or contract, but in form only.

*Follett* for the defendants.—The question is, Whether legacy duty accrues on the devise of a rentcharge? This is not the bequest of an annuity charged on, or made payable out of land, but a devise of real estate The will vests a legal estate in the rentcharge in *Joseph Troughton*, under 27 H. 8. c. 10. § 4.: for without directing trustees to receive, or to receive and pay over the rents, it devises the land for the uses of *Joseph Troughton*, that he may receive out of it the rentcharge. The definition of a legacy in 36 G. 3. c. 52. § 7. which only imposed a duty on the bequest of an annuity issuing out of personalty, is not altered by 45 G. 3. c. 28. § 4. except in making an annuity liable to legacy duty where real estate contributes to the payment. Here the grantee having a legal freehold estate in the rentcharge might elect to make it personal by suing on it in annuity, and thus only charging the person of grantor, or to make it real as a rentcharge, by distress and avowry. (*c*)

*Littleton*, sect. 219. is, "Also if a man grant by his deed a rentcharge to another, and the rent is behind, the grantee may chuse whether he will sue a writ of annuity for this against the grantor, or distrain for the rent behind, and the distress detain till he be paid; but he cannot do or have both together, &c. For if he re-

(*a*) Carth. 361. (*b*) 2 East. 573.
(*c*) 2 Bla. C. 40. Co. Lit. 144. b. Litt. § 218.

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covers by writ of annuity, then the land is discharged of the distress, &c. and if he doth not sue a writ of annuity but distrain for the arrearages, and the tenant sueth his replevin, and then the grantee avows the taking of the distress in the land in a court of record, then is the land charged, and the person of the grantor discharged of the action of annuity."

The annuity in *Hales* v. *Freeman*, (*a*) on which legacy duty was paid, was in the nature of a specific legacy, and was secured on real estate. But this will confers an interest having every incident of land, *e. g.* as capable of grant, assignment, descent and devise, conferring a privilege of voting, and qualification for the magistracy. Then if the whole freehold is devisable, free from duty, why should a devise of part be liable?

Next, who is in this case chargeable with the duty, as answering the description of trustees in 45 G. 3. c. 28. § 5. (*b*) Trustees in this will are not trustees within that act, for as they have no power to take the rents, and have no interest either in the rentcharge or the land made subject to it, the statute of uses having vested the estate, they could not pay the duty out of

(*a*) 1 Brod. & Bing. 391.

(*b*) That section enacts, that the duties hereby granted on legacies, or charged on or made payable out of any real estate, or out of any monies to arise by the sale of any real estate, or upon residues, or parts or shares of residues of any such monies, shall be accounted for, answered and paid *by the trustees or trustee* to whom the real estate shall be devised, out of which the legacy or legacies, or share or shares of any money arising out of the sale or mortgage or other disposition of such real estate shall be to be paid or satisfied, or if there shall be no trustees, then by the *person or persons entitled to such real estate*, subject to any such legacy, or by the person or persons empowered or required to pay any such legacy, *and the said duties shall be retained by the person paying or satisfying* any such legacy, or share of money in like manner, and according to such rules and regulations, and under and subject to such penalties as far as the same can be made applicable, as are contained in an act passed in the 36th year of the reign of his present Majesty.

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either according to that section. The trustees there intended, are the persons who have power to sell the real estates, and to raise the legacies out of them, and who might pay the legacy out of the proceeds. It is conceded that the party beneficially interested in the legacy, &c. is not liable to pay the duty, and that the crown must sue the person who has the funds out of which the legacy, &c. is to be paid. Here if the defendants did not pay the rentcharge, his only remedy would be by entry or distress, which forms the distinction from the case intended by the act, *e. g.* where an annuity is given and an estate devised to trustees to sell and pay it, so that they might be compelled in equity to pay the legacy by making the land contribute. The words of the acts exclude the annuitant from paying the duty, for it is imposed on the receipt which the person who pays a legacy, &c. is bound by a penalty (*a*) to take from the legatee. Thus some person other than the legatee, viz. the person having the controul of the funds, must in the first instance pay the duty, by taking the receipt stamped according to 36 G. 3. c. 52. § 27. But here no person has such power, for the owner of the legal estate in the rentcharge cannot retain under that section, because his whole remedy against the land is only by distress or entry. Nor can the trustees retain, they having no power to take the rents and pay them over, and having no interest whatever in the land or rentcharge.

Where an annuity is given charged on real estate, the legacy duty is payable by the party having possession of the rents, but when a rentcharge is devised with power of distress, that interest is not liable to duty, for the devisee himself takes a portion of the realty devised, and is not to receive his money out of rents paid to any other person.

(*a*) 36 G. 3. c. 52. s. 26.

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Lastly, if this tenant for life is liable to legacy duty, then if he has not the annuity in hand to retain from, as in the case of the whole being levied by distress, and avowed for by the grantee, he may undergo hardship in being compelled to pay the crown. Nor could he be relieved in equity, for a sale of the real estate cannot here be compelled, as might have been done in *Hales* v. *Freeman*.

*Amos* in reply.—The hardship would be greater if the annuitant was not ultimately obliged to pay the duty. According to the act, the crown, for the convenience of levying the revenue, is entitled to look, in the first instance, to the person who in the ordinary course, viz. in the absence of default, would take the profits, and might sue the annuitant for money paid to his use. His being driven so to sue can only happen on default of payment, which is not the ordinary course. Besides the tenant for life takes nothing except minus the 500*l.* per annum. Even if the grantee can have a legal estate in the rent-charge, the act applies, as he is not to distrain till default of payment. The stamp act affects equitable as well as legal estates.

*Cur. adv. vult.*

On the next day the judgment of the Court was delivered by

LORD LYNDHURST C. B. — The testator, *Samuel Jackson*, gave a life estate to *Charlotte Troughton*, with certain other property of which he was possessed at the time of his death, and after her death, and in the event of her husband, *Joseph Troughton*, surviving her, he gave him an annuity of 500*l.* a year, payable quarterly, subject to which annuity he gave his real estate in moieties to *Randle Jackson* and *William Jackson*, *Randle*

*Jackson* having an estate in fee, *William Jackson* an estate for life.

The question is, whether the annuity of 500*l.* a year thus given to *Joseph Troughton* is to be considered as a legacy within the meaning of the acts of parliament imposing duties on legacies?

It was contended for the defendants, that this annuity is in fact real property, being a rentcharge, and a freehold interest in the party in whose favour it is granted; that it was as much real property, as far as relates to the 500*l.* a year, as the estate out of which it issues; or as the estate taken by *Randle Jackson* and *William Jackson*; and that it was not the intention of the legislature, in imposing this legacy duty, to impose any duty whatever upon real property. It is necessary, however, to consider the language of the act. The last act, which imposes a duty on legacies, 55 G. 3. c. 184. has these words in describing what a legacy is. "A gift, by way of annuity, out of or charged upon his or her real estate." In making use of those terms, the legislature copied the previous words made use of in 48 G. 3. c. 149. and, also, with a slight variation of the terms, used in 45 G. 3. c. 28. in which act the word "payable" had been inserted before "out of."

Now by the terms of this will, after giving the real estate to *Randle Jackson* and *William Jackson*, as trustees, to the use of them, their heirs and assigns, during the lifetime of *Charlotte Troughton*, the wife of *Joseph Troughton*, upon trust, to preserve the contingent remainders, it proceeds thus: "And from and after the decease of the said *Charlotte Troughton*, the said testator declared, that the said defendants and their heirs should stand seised of the said hereditaments to the use and intent, that the said *Joseph Troughton* should during his life receive by and out of the said hereditaments and the rents thereof, one annuity or clear yearly rentcharge

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of 500*l.* clear of taxes and without any deduction or abatement whatsoever, to be payable quarterly on the usual feast days for payment of rent, the first quarterly payment to be made on such of the same feast days as should next happen after the decease of the said *Charlotte Troughton*, with such power and remedies of distress and entry and perception of rents, in case the said annuity of 500*l.* should be in arrear, as are reserved to lessors for the recovery of rents on leases for years." Now in reading this clause it appears to us, that it comes precisely within the terms made use of by the legislature, "a gift by way of annuity out of or charged upon his or her real estate." We cannot, therefore, take upon ourselves to say, as this clause comes precisely within the terms made use of by the legislature, that the legislature did not intend that it should apply to a case of this description.

The next question which was raised was, as to the parties by whom this legacy duty was payable. By the regulations with respect to the payment of the legacy duty on annuities, the value of the annuity is, in the first instance, estimated according to the tables contained in 36 G. 3. c. 52. That amount is to be paid by four quarterly payments, the highest charge of duty being ten per cent. It is obvious, therefore, upon making a calculation, that the money to be paid in respect of the first instalment must fall greatly short of the sum which the annuitant would be entitled to receive in that year. The person, therefore, paying the annuity is never required to be in advance, and is allowed to retain the payment on account of duty out of the payment made to the annuitant.

In this case, so far as relates to the persons who are interested in the land, their interest is in moieties. One has a right to the estate for life, and the other to the estate in fee, but each moiety is liable to the payment of

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the annuity, Under such circumstances, we conceive that both parties, the life-tenant in respect of one moiety, and the party entitled in fee as to the other moiety, are jointly bound to pay this annuity. There is no hardship in this case on the tenant for life, for as I have before stated, in directing our attention to the amount that is to be paid, it appears, that the party making the payment is never required to be in advance, but the annuity is paid after retaining the payment that is due to the crown. It appears to us, therefore, that no hardship can be complained of by the tenant for life, in being made jointly answerable with the tenant in fee, to the payment of this annuity. Taking the extreme case to be eighteen years' purchase, the highest sum payable is ten per cent., and therefore a fortieth part only; the highest sum chargeable must therefore be less than the sum which is to be paid to the annuitant. We think, therefore, that the judgment ought to be for the Crown.

Judgment for the Crown for 97*l.* 13*s.*

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## The ATTORNEY GENERAL *v.* KEY and Others.

(In Error from the Exchequer.)

Before Lord TENTERDEN C. J. — LITTLEDALE, J. PARKE, and TAUNTON, Justices of K. B.; A. PARK, BOSANQUET, and ALDERSON, Justices of C. P.

Information under 6 G. 4. c. 108. s. 45. for penalties

INFORMATION for penalties under sect. 45. of 6 G. 4. c. 108. against smuggling. The question arose on for harbouring foreign spirits and tobacco, *liable to payment of duty on importation*, and which had been imported, *the duties not having been first paid or secured.* The jury found that the goods were imported in smaller packages and casks than allowed by law, and not in order to be warehoused; and also, that the defendants harboured them, knowing the duties thereon not to have been paid.

Held upon the construction of 6 G. 4. c. 107. s. 52. and s. 128. that they were goods *prohibited* to be imported; and were therefore improperly described in the information.

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the first count, which alleged, that the defendants "did knowingly harbour, keep, and conceal certain goods *liable to the payment of duty on the importation thereof*, which had then and there been imported and illegally unshipped, *the duties thereon not having been first paid or secured*, that is to say, 500lbs. weight of tobacco, &c. and 400 gallons of foreign Geneva and brandy, whereby," &c.

At the trial, before *Alexander* L. C. B. at the Sittings after *Trinity* term 1829, a special verdict was found on the first count, viz. That defendants imported into the United Kingdom the tobacco mentioned in the first count, in packages containing 28lbs. weight each, and no more, which packages were not at the time the same were so imported aforesaid, packed in any outward package, containing 450lbs. weight net at least; and that the defendants imported into the United Kingdom also the foreign Geneva and brandy in that count mentioned, in casks containing four gallons each, and no more (*a*), and that the same goods were not imported into the United Kingdom to be legally deposited or warehoused for exportation (*b*), and that the defendants did knowingly harbour, keep, and conceal the said goods so imported, &c. well knowing that they had been imported and unshipped in manner and form aforesaid, without any duties thereon having been first paid or secured, &c. Verdict for defendants on the other counts.

The question was, Whether the tobacco and spirits were not goods absolutely prohibited to be imported, in consequence of having been imported in packages of less than the legal size, and if they were, whether the finding supported the information, which was founded on 6 G. 4. c. 108. s. 45., that section applying to the harbouring,

(*a*) 6 G. 4. c. 107. s. 52.

(*b*) If so packed they could not be warehoused. See 6 G. 4. c. 107. s. 53. and s. 128.

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&c. of goods prohibited to be imported, or of goods illegally unshipped without duties paid

Judgment having been given for the defendants after argument in the Exchequer (*a*), a writ of error was brought by the Attorney General, assigning for errors, that the goods mentioned in the first count were liable on importation to payment of duties, notwithstanding the importation was prohibited in respect of the packages in which they were alleged to have been imported, and that the defendants ought not to set up or avail themselves of a defence arising out of their own breach of the law.

This writ of error was argued on 1st *November* 1831, by

Sir *George Grey* for the Crown. — By 6 G. 4. c. 108. s. 45. (*b*) the penalties sought to be recovered are for harbouring, &c. goods liable to duty on importation, but imported without having paid or secured the duty (*b*). Now the importation of foreign spirits and tobacco in packages smaller than the legal size, is a breach of the *restrictions* imposed on the import of those articles by

(*a*) See Vol. I. p. 52.

(*b*) 6 G. 4. c. 108. s. 45. Enacts that every person not arrested and detained as hereinafter mentioned, who shall, either in the United Kingdom or the *Isle of Man*, assist or be otherwise concerned in the unshipping of any goods which are prohibited, or the duties for which have not been paid or secured, (or who shall knowingly harbour, keep or conceal, or shall knowingly permit or suffer to be harboured, kept or concealed, *any goods* which have been illegally unshipped without payment of duties, or which have been illegally removed without payment of the same, from any warehouse or place of security in which they may have been originally deposited, or shall knowingly harbour, keep or conceal, or permit or suffer to be harboured, kept or concealed, any goods *prohibited* to be imported or to be used or consumed in the United Kingdom or in the *Isle of Man*; and every person, either in the United Kingdom or the *Isle of Man*, to whose hands and possession any such uncustomed or prohibited goods shall knowingly come, shall forfeit either the treble value thereof or the penalty of 100*l.* at the election of the commissioners of His Majesty's customs.

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6 G. 4. c. 107. s. 52.; but by such illegal packing they do not become goods absolutely prohibited to be imported. The different enactments in force on the subject shew that prohibition is opposed to, and distinguished from, restriction, which is only for protecting the duties, and though consolidated in the acts of 6 G. 4. and subsequent years, they are not new in substance, and are therefore to be construed with reference to decisions on former acts of a similar nature now repealed. The preamble to 6 G. 4. c. 107. shews no intention of the legislature to make new laws of customs, but to secure the purposes for which the old laws were from time to time made by new enactments in more perspicuous and compendious terms. Only two classes of goods are recognised as the subject-matter of the customs acts, viz. Goods prohibited to be imported, and Goods permitted to be imported on paying certain duties, and these goods are in the second class. Then, are they goods prohibited by 6 G. 4. c. 108. s. 52. and s. 128. to be imported? or, are they goods "which shall be imported only under the restrictions mentioned in the table in 6 G. 4. c. 108. s. 52. ?" That section contains "A Table of Prohibitions, and Restrictions Inwards," composed of two lists, one of "goods absolutely prohibited to be imported," the other, "a list of goods subject to certain restrictions on importation." *Foreign* spirits only occur in the latter list thus, "all other spirits — unless in casks containing not less than forty gallons." Tobacco and snuff, unless packed in packages of 100lbs. weight if from the East Indies, or 450lbs. weight, if from any other place. The distinct objects of these tables, viz. to prohibit import of some articles, and to restrict the mode in which the import of others may be made, are illustrated by 6 G. 4. c. 111. imposing duties on imports, in which not one article, wholly prohibited to be imported by the first list annexed to 6 G. 4. c. 107. s. 52., can be found, except

gunpowder, to which a duty is attached, as it may be imported by license from his majesty, but every article in the second list merely restricted in its mode of import, is made liable to duty in common with other articles, without attending to the quantity imported. Again, by 6 G. 4. c. 107. s. 52. list 2, the import of hides, &c. may be prohibited by order in council; but would that order be a defence to a claim for duties if they were actually imported? The goods in question are forfeited, not as goods prohibited to be imported, but as imported contrary to the restrictions. The article is in its nature the same, whether the condition of importing it in the restricted mode is observed or not, and *quacunque viâ*, may, when imported, be described as liable to duty. Though 6 G. 4. c. 107. s. 128. declares goods, the import of which is restricted on account of the packages, to be prohibited goods, that enactment is only for the purposes of seizure, as to which their not being legally packed is to demonstrate to the officers that they have not paid the duties, and are therefore forfeited and seizable. Sect. 52. too, had declared goods imported, contrary to the restrictions in the table annexed, to be forfeited. Further, by 7 & 8 G. 4. c. 73. s. 5. tobacco and spirits removed without a permit shall be deemed to be unshipped without payment of duty, unless the party possessing them shall prove the contrary. The provision is general, applying to all quantities, and if these goods were seized in these illegal packages, (and it is only in small quantites that smuggled goods are conveyed,) it could not be shewn, in pursuance of that section, that the duty had been paid. The crown may elect to take treble value of these goods by way of penalty, but that value can only be ascertained under 7 & 8 G. 4. c. 56. s. 6. according to the rate which goods of the like sort bear in *London*, and on which the import duties have been paid, but that section cannot apply if they are totally prohibited, for

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such would not be saleable in *London*; *e. g.* spirits above proof, or from the *Isle of Man*, or any other article in the first list annexed to 6 G. 4. c. 107. s. 52. If these goods when smuggled in small quantities are prohibited goods under s. 128. they could not be sold at the Custom-house, as is the practice in order to obtain the duties, and so take them legally into home consumption.

*Doe q. t.* v. *Cooper* (*a*), was an information for treble value in the nature of a penalty, on 8 A. c. 7. s. 17. for importing *in quâdam nave sive vase vel in quibusdam navibus sive vasibus*, sixty gallons of brandy, then and there being liable to the payment of duty, and for having same in possession, well-knowing that the same had been imported without having paid the duty, and it was held by three Barons against *Montagu* B. that it should pay duty, though stat. 4 & 5 W. & M. c. 5. s. 8. (then in force) was express, that no brandy should be imported from parts beyond the seas in any vessel or cask which should not contain sixty gallons at least, on pain of forfeiting the same, or the value thereof. As nothing on that record shews the casks to be unsizeable, the present question must have arisen on the evidence at the trial as it did here, viz. Whether the importation in unsizeable casks bore out the allegation, that the goods were liable to the payment of duty, and whether importation in that mode protected the party from such payment? and that case was recognized in *Att. Gen.* v. *Jewers* and *Batty* (*b*), which was an information of debt for duties on wine. It was objected that part being *French* and coming from *Holland* were prohibited and forfeited by 13 & 14 C. 2. c. 11. s. 23. and so that no duties were payable. But, per Lord Chief Baron, "this is not an

(*a*) Bunb. 44. Mich. 2 G. 2. The records of this and the next case were produced at the argument. The dates of the terms and years varied from those stated in *Bunbury*.

(*b*) Bunb. 225.

absolute prohibition, but a prohibition *sub modo* (*a*), as in case of brandies, has been resolved since *Doe q. t.* v. *Cooper*." The fact, that the wine so imported from *Holland*, contrary to 13 & 14 C. 2. c. 11. s. 23. was *French*, must have appeared at the trial as part of defendant's case; but as 12 C. 2. c. 4. s. 1. imposed a duty on *French* wine, it was held, that the wine, though seizable for being imported from an improper place, became, when once imported, liable to duty as "*French* wine."

That case shews, that "prohibited," in this case, means no more than restricted, the goods being forfeited on breach of the restriction or condition. As the crown cannot sue for a penalty after three years, then if this information cannot be sustained, in many instances it will be without remedy. The smuggled articles cannot, after that period, be identified so as to support an information *ad rem*, and the importation in illegal packages may be set up as a defence to a proceeding for the duties. The defendants' act, in importing the goods in illegal packages, has prevented the crown from receiving the duties on entry of the goods in the regular way. But the breach of the condition, as to packages, does not exonerate the defendants from liability to duty, for it shews that it could not possibly have been paid; that inability arising from their own illegal breach of the law by importing in illegal packages.

*John Jervis* for the defendants.—This information is for harbouring and concealing tobacco and spirits *liable to payment of duty*, the duties on which had not been paid; so that 7 & 8 G. 4. c. 56. s. 5. does not affect the question, for it only applies to goods which must be protected by a permit, *viz.* goods liable to payment of

(*a*) At this time a duty was payable on French wine imported by British subjects. See 12 C. 2. c. 4. s. 1.

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duty, and goods *in transitu*. Then is the allegation of liability to payment of duty supported by proof that the defendants imported in illegal packages and casks? Stat. 6 G. 4. c. 108. s. 45. makes it an offence to harbour four distinct classes of goods: 1st. goods illegally unshipped without payment of duty; 2d. goods legally unshipped, but illegally removed from the place of deposit without paying duty; 3d. goods prohibited to be imported; and 4th, goods prohibited to be used or consumed in the United Kingdom; all which come under two general heads, customable and prohibited goods. Section 32 of 6 G. 4. c. 108. says nothing of a restriction of import, but speaks of forfeited goods, which must be either customable or prohibited. But the defendants could not have insisted on paying the duty on these goods. The prohibition in 6 G. 4. c. 107. s. 52. is not absolute, but conditional; it becomes absolute on the condition not being performed, and the goods are thereby forfeited. This view of the case is confirmed by s. 128. which, though said to apply only to seizures, is abundantly general in terms, and supported by other provisions in the several acts relating to customs, which are always construed as one code of laws. By s. 52. the goods are forfeited, but its terms are not restrained to any particular goods. The count lays the goods to be liable to duty on their importation, but could the duties be paid had these goods arrived at the custom-house? The impost of duty on restricted articles by the schedule of 6 G. 4. c. 111. only applies to goods which may be imported. If goods restricted *quoad*. the mode of their import are not prohibited goods when that mode of import is not observed, there will be no enactment to meet the case of restricted goods. The judgment in the *Attorney General* v. *Jewers* was merely for duties. As to *Doe q. t.* v. *Cooper*, the stat. W. & M. contained

no clause like 6 G. 4. c. 107. s. 128. declaring that restricted goods should be deemed prohibited.

Lord TENTERDEN C. J.—We are of opinion that the judgment of the Court below ought to be affirmed. This is an information for penalties, not for duties, nor for condemnation of the goods; and the question is, Whether the goods are properly described in the first count? We think they are not. No person can read it without conceiving the defendant to be charged with harbouring and concealing goods imported under circumstances upon which a duty might have been paid, and not with harbouring goods imported in a manner and under circumstances in which the duty could not have been properly paid. It is not contended that any instance can be found, in which spirits imported in casks of this small size have been taken to the custom-house by the importer, for the purpose of paying the duty, or that the duty has been paid on them; and the same may be said of tobacco imported in such small quantities as in this case. It has been, however, argued, that the count is supported by the finding, because the articles harboured are liable to payment of duty. Undoubtedly, brandy and tobacco, speaking of them generally, are articles so liable, and may be lawfully imported on payment of duty, under certain restrictions; but we think that, on the true construction of the act on which this question arises, these particular articles are prohibited to be imported in the quantities in which they were imported, and accordingly, that the defendants ought to have been charged with harbouring goods of which the importation was prohibited, and not with harbouring goods on which duty had not been paid. It has been argued for the crown, that the table annexed to stat. 6 G. 4. c. 107. s. 52. and entitled "a table of prohibitions and restric-

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tions inwards," contains two descriptions of goods; those in the first list, which are absolutely prohibited, and those in the second, the importation of which is subject to certain conditions or restrictions. The goods in question fall under the latter description, and the argument for the crown founded on this distinction, might have been sustained, had there been nothing more in the act; but the 128th section, after providing for seizure of forfeited goods, ships, vessels, and boats, as well as the packages in which forfeited goods are contained, Enacts "that all goods, the importation of which is restricted, either on account of the packages or the place from whence the same shall be brought, or otherwise, shall be deemed and taken to be prohibited goods; and that if any such goods shall be imported into the united kingdom, other than to be legally deposited or warehoused for exportation, the same shall be forfeited." Now this is an express enactment that goods, the import of which is restricted on account of the packages, and which are imported in packages contrary to that restriction, shall be deemed and taken to be prohibited goods. But it has been argued that the word "prohibited" in this section, only applies to the power of seizure given to the officers of customs. But without any reason to confine the word to this narrow construction, we ought to read it in its general and enlarged sense, and to say that goods imported in these small quantities are goods prohibited to be imported, and are not so laid in this count as we think they ought to have been. The cases cited do not appear to us to decide this question. In *Doe q. t.* v. *Cooper*, which turned on stat. 4 & 5 W. & M. c. 5. the 8th section of that statute contained no actual words declaring that brandy, in less than sixty-gallon casks, should be prohibited to be imported, as is now done in 6 G. 4. c. 107. s. 128., but merely enacted that brandy should not be imported

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in casks *of less than* sixty gallons. The words of 6 G. 4. c. 107. s. 128. have since gone a step further.

As to the other case of the *Attorney General* v. *Jewers*, we are by no means prepared to say that the crown may not waive the penalties, and sue for the duties in a case of this kind; and our judgment on this record will form no ground for any position that the crown may not sue for the duties. This, however, is an information, not for duties, but for penalties; and if the crown elects to sue for the latter, the information should charge the fact according to the truth, and not in an obscure or ambiguous manner, calculated to mislead the defendants. For these reasons, we are of opinion that the goods are not properly described, and that the judgment of the Exchequer must therefore be affirmed.

Judgment affirmed.

Taxing costs in error.

The Clerk of the Errors having stated that costs in error from the Court of Exchequer had been in practice allowed by the Lord Chancellor, before he ceased to be a member of the Court of Error, (*a*) and requesting to be informed of the course to be now pursued—

Lord TENTERDEN was understood to say, that he thought that the costs in error, which were formerly allowed by the Lord Chancellor, as a member of the Court of Error, should now be taxed in the same manner as costs in error taxed upon bills of exceptions.

(*a*) See 31 Ed. 3. st. 1. c. 12. 31 Eliz. c. 1. s. 1. 16 C. 2. c. 2. and 20 C. 2. c. 4. 1 W. 4. c. 70.

## ANN POOLE *against* POOLE and Others.

In February 1816, a marriage was had between two minors by license, and without consent of parents. After co habiting till *June* 1816, the owner of the house where they lodged compelled the husband to leave it for his misconduct. The husband never lived with his wife after, and died in *October* 1817. Shortly after they separated, he on several occasions declared he would never live with her again, giving as one reason that she was not his lawful wife. Some evidence was given that after the separation she had received small sums which were ultimately allowed out of the rent of the husband's land, but whether by his direction or not did not distinctly appear. Held that these persons did not live together as man and wife till the man's death, so as to make the marriage valid within the retrospective effect of 3 G. 4. c. 75. s. 2.

On the husband's death his devisees entered on his land and continued in possession till 3 G. 4. c. 75. passed, and for five years after, without claim of dower by the wife. *Semble*, had the marriage been rendered valid by s. 2. their possession would have been protected by 3 G. 4. c. 75. s. 6.

BILL for dower. Plea—*ne unques accouple in loyal matrimonie.* The question of the plaintiff's right to dower turning on the validity of her marriage to *Thomas Poole*, as affected by 3 G. 4. c. 75. s. 2. appeared to Lord *Lyndhurst*, when sitting in equity, to be of such importance, that he appointed it to be heard before the full Court.

Accordingly, it was argued there by *Simpkinson* and *Skirrow* for the plaintiff, and by *Jervis* and *Lovat* for the defendant; and though the facts were stated with great precision by Lord *Lyndhurst* in the judgment which was afterwards delivered, still as some arguments were advanced on sect. 6. of the above statute, which were disposed of at the hearing, and did not form a necessary part of that judgment, a brief account of the facts and arguments is subjoined.

*Thomas Poole* and *Ann Smith* were married at *Chester* in *February* 1816, being both minors, and without consent of parents. The licence was obtained on affidavit of *Thomas Poole* that they were both of age, and falsely stating their ages. After the marriage they returned to *Staffordshire*, to the neighbourhood in which the husband's property lay, and cohabited first at the house of

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*Lewis*, where *Thomas Poole* introduced the plaintiff as his wife, and afterwards at the house of *Robinson*. While at the latter place, on the night of the 6th *June* 1816, *Thomas Poole* was obliged by *Robinson* to quit the house, on account of his irregular behaviour there. He went away, leaving the plaintiff there; and after living at two or three public houses in the neighbourhood till *October* 1817, died in that month at his uncle's house. It did not appear that he ever saw the plaintiff after the 6th *June* 1816, but it was proved that they had quarrelled on that night, and that very shortly after he repeatedly declared to different persons that he would never live with her again, stating particulars of her misconduct, and also that she was not his lawful wife. On the 26th *June* 1816, he wrote to her, that if she troubled him, he would advertise her not to be his lawful wife, and would caution all persons against trusting her. Some weekly relief was afforded her by the parish officers, who were repaid by one *Bristow*. This man made her some other small weekly advances, but could not remember whether he did so at the instance of *Thomas* or *James Poole*. These sums were ultimately allowed out of rent due from *Bristow*'s mother to the husband, *Thomas Poole*. He died, having attained his majority, and possessed of an estate in fee tail, which he devised to the defendants, his heirs. At his death they took possession. After some years spent in *Demarara*, during which time she occasionally visited *England*, the plaintiff filed her bill for dower in 1827. The suit abated by her subsequent marriage with *Watson*, but was afterwards revived.

*Arguments for the plaintiff*.—The marriage in 1816 being clearly bad under 26 G. 2. c. 33. s. 11. the plaintiff affirms that it was made valid *ab initio* by the retro-

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spective operation of the 2d section (*a*) of 3 G. 4. c. 75. which passed in 1822. The parties lived together in contemplation of law as husband and wife, till the death of the husband. Their *quasi* separation arose not from any doubts entertained by either of the validity of their marriage, or of any repudiation by them of the imperfect marriage contract, but from the act of a third person, occasioned by the husband's misconduct. Then there was no *animus separandi* when the separation took place *de facto*, and after that event the husband rests his determination not to live with her on her misconduct, and not on the illegality of the marriage contract. In *King* v. *Sansom*, the separation was by actual agreement, with consent of the respective parents; and though the wife was named as such in the clause respecting her maintenance, she is also called by her maiden name, and signed as spinster; but the marriage was held to be made valid by 3 G. 4. c. 75. s. 2.—[*Bayley* B. In that case both parties were living at the time of passing the act.] The words "continuing to live together," must in the many instances of naval men, &c. be satisfied by constructive cohabitation, nor on general principle will the law recognize separation, except by sentence of a competent Court.

The marriage if thus rendered valid, is valid *ab initio*, and the common law right to dower is untouched, though the retrospective words not being in operation till 1822, no power of suit existed before that time.

(*a*) That section enacts, that in all cases of marriage had and solemnized by license before the passing of this act, [22d *July* 1822] without any such consent as is required by so much [viz. s. 11.] of the said statute [26 G. 2. c. 33.] as is hereinbefore recited, and where the parties shall have continued to live together as husband and wife till the death of one of them, or till the passing of this act, or shall only have discontinued their co-habitation for the purpose, or during the pending of any proceedings touching the validity of such marriage, such marriage, if not otherwise invalid, shall be deemed to be good and valid to all intents and purposes whatsoever.

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But is the right to dower taken away by 3 G. 4. c. 75. s. 6. ? (*a*) Now if the marriage had been confessedly good, the defendants would have had an equal right to enter as heirs, and would be bound to assign dower; but the claim to dower had no effect on their possession. Then they have done no act treating the marriage as invalid. S. 6. is that where there are adverse rights, possession being *ipso facto* adverse, shall not be disturbed, but does not apply where the possession is not adverse to, but consistent with the claim.

[Lord *Lyndhurst* C. B. That is one case provided for by the act, but there may be others. We must conclude that no claim to dower was made till after the passing of 3 G. 4. c. 75. on account of the presumed invalidity of the marriage, and that for nearly five years the defendants held the land unincumbered with any obligation to assign dower, the plaintiff having no claim whatever before the act. The spirit of the act is for preventing disturbance of possessions actually enjoyed. Suppose the plaintiff had within a short time after her husband's death, applied to the heirs to assign her dower, and that they had then refused on account of the illegality of the marriage, it is admitted that their possession would have been protected by the act.] The right to dower would there be contested. There can be no adverse possession against dower, nor is it barred by the statute of limitations (*b*). The defendants are not pur-

(*a*) It enacts, that if at any time before its passing, any property, real or personal, has been in any manner *possessed* upon the ground or upon the pretence, or under colour of the invalidity of any marriage, by reason that it was had and solemnized without such consent as aforesaid, then, although no sentence or judgment has been pronounced in any court against the validity of such marriage, *the right and interest* in such property shall in no manner be affected by the act, *but shall remain and be the same to all persons, and to all intents and purposes as if the act had never been made.*

(*b*) See Stat. Merton, 20 H. 3. c. 1.

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chasers for valuable consideration, nor do they take under an heir, but under the will of the husband. They take the property subject to dower, and could only have taken it absolutely had the marriage been avoided by sentence.—[*Bayley* B.—If at the death of the husband an estate descended to them free from dower, were they not possessed of an interest protected by the act?]—The act put the widow in the same condition at the death of her husband as if it had then passed.—[Lord *Lyndhurst* C. B. If the intention of the legislature was, that where parties lived together till the death of either, or till the act passed, the marriage should not be disturbed, it did not mean to enter into the propriety, or the contrary, of the circumstances under which it was contracted. Here if either point is against the plaintiff, the bill must be dismissed.]

*Arguments for defendants.*—This marriage being void under 26 G. 2. no right to dower could arise under section 6 of 3 G. 4. c. 75. Supposing that section had not existed, they must have "continued to live together till the death of one" in order to satisfy the 2d section. Then the only question is, whether or not they did so live together? Had this separation been by agreement, the case would have been taken out of the statute by the acquiescence in the marriage at that time. *King* v. *Sansom*. Now though an officer serving abroad may be held to be living with his wife here, so as to satisfy the act, yet these parties not only lived apart for the last 17 months of the husband's life, but the husband declared she was not his wife, and that he would not live with her. The plaintiff was to establish the affirmation that they did live together; whereas no cohabitation since *June* 1816 has been shewn; on the contrary the evidence is that they mutually disowned each other. In *King* v. *Sansom*, without doubt the husband

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and wife "lived together" as such within this act, up to the moment of the separation, and as such agreed to separate by a deed acknowledging the woman as a wife, and allowing her an income as such. That deed was an acquiescence in the validity of the marriage as existing at the time of the contract, but it expressly turns on the husband's acknowledging her to be his wife, whereas here he repudiates and deserts her.

Then as to the defendants liability to assign dower under s. 6., was it necessary for them to state that they took possession of the whole on the ground of the illegality of the marriage? That they were in possession of the whole, must be intended from the act of entry and continuance in possession, no claim being ever made by the wife, who acquiesced in the possession for five years after the act passed, no bill being filed till 1827.

*Cur. adv. vult.*

The judgment of the Court was afterwards delivered by

Lord LYNDHURST C.B.—This is a case arising upon the construction of the statute 3 G. 4. c. 75. (*a*) which in its recital sets forth the 11th section of the marriage act, 26 G. 2. c. 33. relating to the marriage of minors without consent of their parents and guardians, (*b*) and proceeds to state that "great evils and injustice had arisen" from the provisions to which I have referred. (*b*) The act of 3 G. 4. c. 75. repeats the above provi-

(*a*) 3 G. 4. c. 75. received the royal assent 22d *July* 1822. (See *Tyrwhitt's* Observations on this Act, published 1822.)

(*b*) By the recited clause of 26 G. 2. c. 33. all marriages by *licence* after 25th *March* 1754, had without consent of parents or guardians were made absolutely null and void.

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sions, and substitutes new regulations with respect to marriages thereafter to be solemnized; (*a*) but in section 2. refers also to marriages solemnized *before* its passing, and enacts that in all cases of marriage had and solemnized by licence before the passing of that act, without the consent required by 26 G. 2. c. 33. s. 11. therein before recited, and where the parties shall have continued to live together as husband and wife till the death of one of them, or till the passing of the act, such marriage if not otherwise invalid, shall be deemed to be good and valid to all intents and purposes whatsoever. The question, therefore, in this case is, Whether within the meaning of this act *Thomas Poole* and *Ann Poole* did continue to live together as man and wife at the death of *Thomas Poole*? The facts of the case are shortly these—*Thomas* and *Ann Poole* were married by licence in *February* 1816, being both minors at the time. The license was obtained on an affidavit of *Thomas Poole*, the husband, in which he swore that they were both of age. After the marriage they lived together as man and wife, first at the house of a person named *Lewis* for a few weeks, and afterwards at the house of a person named *Robinson*, where they continued to live together till the 6th of *June* 1816. The conduct of the husband was so irregular, that *Robinson*, the owner of the house, desired him to quit it, which he did, leaving his wife there. He then went to live, first at one inn called the Three Tuns, and afterwards at another called the Talbot, and remained there separate from his wife till *October* 1817, when he went for three or four weeks to his uncle's house, where, in that month, he died, having been absent from his wife in all about 17 months. It

(*a*) These regulations were repealed as to s. 8—26. by 4 G. 4. c. 17. and the rest of 3 G. 4. c. 75. *in toto, except as far as it repealed any other* act by 4 G. 4. c. 76. As to the present force of 26 G. 2. c. 33. see 1 Addams's Consistory R. 94. n.

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does not appear that during all that period he ever saw her, and from the evidence of several of the witnesses, it appears that he continually insisted she was not his lawful wife. When the witness *Lewis*, at whose house they had lived together, and where, after his leaving her, she took refuge, applied to him on her behalf, he told him that he would never live with her again; that she was not his lawful wife. He stated the same thing precisely to *Hancock*, another witness, always insisting that she was not his lawful wife. The same fact is established by his letter to her written on the 26th *June* 1816, just after leaving her, in consequence of some application which appears to have been made to him on her behalf. He there says, that if she does not cease to trouble him, he will advertise her as not being his lawful wife, and caution all persons not to trust her. It appears that though he was separated from her on 6th *June* 1816, in consequence of being turned out of Mr. *Robinson*'s house for his misconduct, he almost immediately afterwards refused to acknowledge her as his lawful wife, declaring she was not such, and giving that as one reason for refusing to live with her. Under these circumstances it appears to us impossible in any view of the case, or on any construction of this act, to consider that these persons were living together as man and wife at the period of the husband's death in *October* 1817. *King* v. *Sansom* (*a*) has, however, been cited, which was originally decided by Sir *Christopher Robinson* in the Consistory Court of *London*, and afterwards confirmed on appeal to Sir *John Nichol* in the Court of Arches. In that case the marriage was invalid under the operation of stat. 26 G. 2. c. 33., but the parties separated by agreement, and not only by agreement, but a separate maintenance by bond was given to

(*a*) 3 Addams Rep. 277.

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the wife by the husband, and the judge of the Consistory Court was of opinion that though in point of fact they were not actually living together in 1822, at the time when the act of 3 G. 4. c. 75. passed, yet that they must be considered in legal construction to be so living together. It appears to us, however, that the circumstances of that case are widely different from the present, and that none of the grounds reported as those on which that judgment was founded, exist here. The reasons relied on by the learned Judge are these, he says, "The actual separation of the parties in this case, was without any reference apparently to doubts entertained by both or either as to the legal validity of their marriage." Now, though in this case the separation does not appear to have originally arisen from any doubt with respect to the validity of the marriage, yet almost directly after the actual separation occurred, and from that time down to the period of the husband's death about 17 months after, the invalidity of the marriage was continually put forward by him as a reason for their continuing to live separate. The first ground, therefore, on which Sir *Christopher Robinson* relied in *King* v. *Sansom*, not only does not exist in this case, but the direct reverse appears. That learned judge then proceeds: "On the contrary they separate by virtue, to some extent, of a deed in which the party proceeded against is expressly recognized as the wife of the party proceeding in this suit, and by which a separate maintenance is provided for her expressly in that character." So that in the case cited, the woman was styled the wife of the other party in the very instrument in which a future provision is secured to her; that instrument being a deed of separate maintenance, an instrument of a character peculiar to the case of husband and wife. That case, therefore, most materially differs from the present.

One other fact, however, has been relied on, to which it is material I should advert. It appears that during the separation, the overseers of the parish were applied to by Mrs. *Poole* for relief, which they accordingly gave, to the amount in all of about 2*l.* 12*s.* 6*d.* That sum was reimbursed to them by *Bristow*. A warrant to arrest *Thomas Poole* had been issued, but was not executed owing to the drunkenness of *Poole*, who threatened the officer. *Bristow* afterwards continued to advance money to *Mrs. Poole* at the rate of about 4*s.* a week, making with the 2*l.* 12*s.* 6*d.* reimbursed to the overseers, a sum of about 6*l.* *Bristow* does not assert that he did so at the instance of *Thomas Poole*, but of *Thomas* or *James Poole*, he cannot say which. The sum was, however, ultimately allowed to *Bristow* in this way; *Bristow's* grandmother rented a farm under *Thomas Poole*; *Bristow* had the management of it, and was allowed to deduct the 6*l.* out of the rent due from his relation, but whether in consequence of any order of *Thomas Poole*, or if so, at what time received, does not appear. These circumstances appear too slight and distant to outweigh the other facts of the case, and we are therefore of opinion, that these parties cannot, within the fair construction of this act, be considered as having lived together as man and wife up to the time of *Thomas Poole's* death. The bill must consequently be

Dismissed with costs. (*a*)

(*a*) See *Rex* v. *Inhabitants of St. John Delpike*, 2 Bar. & Adol. 226.

## SIMPSON and Others *v.* HENRY MANLEY and Another.

A guarantee stipulated that *if the plaintiffs would give credit to A.*, the defendants would be responsible that his payments should be regularly made. Held, that the word "credit," did not mean the credit usually given by dealers in a particular trade, but a reasonable credit according to the terms on which the parties should agree to deal. Held also, that this was a continuing guarantee within the period fixed.

ASSUMPSIT for 1000*l.* on a guarantee. At the trial before Lord *Lyndhurst*, at the *Middlesex* sittings after *Trinity* term 1831, the following guarantee was proved, contained in a letter signed by the defendants, and addressed to the plaintiffs by the name of their firm.

"Messrs. *North* and Co.

"Our relation, Mr. *Thomas Manley*, having intimated to us that he is about to make *some purchases of goods* from you, we beg to say, that *if you give him credit*, we will be responsible that his payments shall be regularly made to the extent of 1000*l.* from this period to the 1st of June 1831."

"*Henry Manley.*
"*John Eagles.*"

*Halberton,*
26th *May* 1830.

The question was, Whether the credit given to *Thomas Manley* was within the terms of the guarantee? The plaintiffs were wholesale grocers, and their terms of sale of sugars to *Thomas Manley* had not strictly corresponded with the usual course of that trade. *Thomas Manley* proved, that before the guarantee was given, he purchased sugar for refining, at a credit of seventy-three days, and according to the mode of dealing of the plaintiff's firm, instead of accepting a bill at two months, he paid them cash on the seventy-third day, which corresponded with the last day of grace had a bill been drawn (*a*). But after the guarantee, he obtained the

(*a*) He also deposed that the general usage of dealing in the sugar trade is either to pay at the end of two months in cash, called trade prompt, *e.g.* if bought on 25th *July* to be paid for on 25th *September*, in cash; but if bought by a *grocer*, it must be paid for on the Saturday after the two months expired; if by a *refiner*, on the Monday after the two months; if by

consent of the plaintiffs to extend this period of credit to the *Saturday* following the seventy-third day, which was an unusual indulgence. The sureties were not in trade, were ignorant of the terms of the previous dealing between the plaintiffs and *Thomas Manley*, and received no intimation from him that the usual course of dealing had been departed from. Different purchases were made after the guarantee, some of which were paid for at different credits of seventy-four, seventy-six, and seventy-eight days, but when, on 27th *November* 1830, a commission issued against *Thomas Manley*, a balance of more than 1000*l.* remained due from him.

Lord *Lyndhurst* C. B. stated the guarantee to be a continuing guarantee (*a*), and directed a verdict for the plaintiffs for 1000*l.* with leave to move for a non-suit.

*R. V. Richards* moved accordingly. — The intent of the sureties at the executing the guarantee must have been, that the credit given should be that usual in the trade, and the expression, "if you will give him credit," shews it. They are therefore exempted from liability by the extended period of credit here given, contrary to the usage of trade. If the sureties should be held liable in this instance, they might be liable to pay at the end of any shorter period to which the credit might be narrowed.

bill, then by bill at seventy days from date of contract if no period of credit expressed, the contract is considered as prompt at two months, but when made by brokers for their principals, the terms "usual prompt," or "acceptance if required," meaning a seventy days' acceptance, are generally used in the sale notes.

(*a*) The defendant's counsel assented. See *Merle* v. *Wells*, 2 Camph. 413. *Mason* v. *Pritchard*, 12 East, 227. 2 Camp. 436. S. C. *Hargreave* v. *Smee*, 6 Bing. 244. *Melville* v. *Hayden*, 3 B. & A. 593. as to continuing guarantees.

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LORD LYNDHURST C. B.—The rule of the trade, as to the mode of payment, does not seem to be so universal or regular as stated; for *Thomas Manley* had, in fact, for a long time before the guarantee, dealt with the plaintiffs upon a different rule as to credit. Then what is there in this guarantee inconsistent with the payments being to be made in the manner agreed on between the plaintiffs and *Thomas Manley*, though differing from that usual in the trade? The words, "regularly made," seem to me to mean, regularly made according to the contract between the parties. Besides the defendants might have provided in the guarantee against the time of credit on purchases being extended beyond a given period to be expressed by that instrument.

BAYLEY B. This question arises purely on the terms of this guarantee. The language used is, "if you give him credit," not specific credit, stating it in terms, but credit generally, viz. meaning, "if you trust him, he and you will settle the terms of the dealings between you." Nor has there been any deviation by the plaintiffs from what the defendants must have understood at the time. The undertaking, that the payments shall be regularly made, means, that they shall be made according to the terms agreed on between the parties. The credit stipulated for is not the usual credit according to the alleged course of the trade, but a fair and reasonable credit, which would not operate as a fraud upon the sureties. The fallacy contended for, arises from the use of the word "credit." The defendants are driven to contend that the same meaning is thus given, as if the word "usual" had preceded "credit," but that is not so. As any credit the plaintiffs pleased might have been stipulated for by them, the guarantee must be construed strictly. No extension of credit was here given to the principal after the time for the payment elapsed, in such

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a sense as to discharge the sureties who were ignorant of it (*a*); but the contract meant to guarantee payments by *Thomas Manley*, according to the terms agreed to between him and the plaintiffs.

GARROW B. concurred.

BOLLAND B. It is contended that this guarantee should be construed, as if the terms *usual* credit had been employed, and not *credit* only. But the undertaking is for the regular payment by *Thomas Manley* for such goods as should be furnished to him on any credit.

Rule refused.

(*a*) See *Nisbet* v. *Smith*, 2 Bro. Ch. C. 579. *Burke's* case, quoted in Ex-parte *Gifford*, 6 Ves. 809. *Rees* v. *Berrington*, 2 Ves. J. 542. *Boultbee* v. *Stubbs*, 18 Ves. 20. A guarantee is good within stat. of frauds, though no consideration is stated between the creditor and the surety. *Exp. Gardom*, 15 Ves. 286. and see *Morley* v. *Boothby*, 3 Bing. 113.

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## POLGLASE *v.* OLIVER.

A tender in local bank notes is good if the creditor does not at the time object to their character as such, but insists on a larger amount being due.

ASSUMPSIT for soap sold and delivered. The general issue was pleaded as to part, and a tender as to the residue.

At the trial before *Taunton* J. at the *Bristol* Summer Assizes, 1831, it appeared, that the defendant's son produced 20*l.* 12*s.* in country bank notes and silver to plaintiff, in payment of his bill. The plaintiff, however, claimed a larger sum on account of a lot of soap sent to defendant, and refused to receive the 20*l.* 12*s.* but without objecting to the notes on account of their being country notes.

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The opinion of the learned Judge being in favour of this tender, the defendant had a verdict.

*Barstow* now moved for a new trial. — In the case of *Wright* v. *Reed* (*a*), *Buller* J. stated it to have been considered by the court, that if Bank of *England* notes are offered in payment, and no objection is made on that account, the tender is to be considered good, "and very properly so, for bank notes pass in the world as cash." (*b*) Lord *Ellenborough* in *Brown* v. *Seal* (*c*), ruled the same way. But the distinction between the general currency of Bank of *England* notes on which Mr. J. *Buller*'s judgment proceeds, and the limited circulation of country bankers' notes is obvious. In *Lockyer* v. *Jones* (*a*), a *Liverpool* bank bill of exchange for 10*l*. was offered to a plaintiff, who refused to accept it, insisting on being paid a larger sum, and Lord *Kenyon* held him precluded from objecting to the legality of the tender, by his conduct at the time, in merely alleging that it was not sufficient to cover his demand. He assigned as a reason, that if the plaintiff had objected to it on account of its informality, the defendant might have tendered it in money. However, in a later case of *Mills* v. *Safford* E. T. 1808, the Court of Exchequer held a tender of a *Bristol* bank bill bad, though not objected to as such at the time. — [*Bayley* B. That case was overruled in *Tiley* v. *Courtier* (*b*). There a tender was made in bank post bills, Bank of *England* notes, and a note of the *Bristol* bank. The plaintiff asked for a larger sum, he said, "the paper might be good for any thing he knew, he did not object to that," but added, "that

(*a*) 3 T. R. 554. A. D. 1790.

(*b*) Tender must have been previously made in money coined at the mint, or foreign coin made current by proclamation. Bac. Abr. tit. Tender, B. 2.

(*b*) 4 Esp. 267. 1803.

(*a*) Peake C. N. P. 239. n. 1796.

(*b*) K. B. Hil. 1817.

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he would have his whole demand." The question as to the validity of the tender was argued, and the court of K. B. held it good. That is probably the case alluded to by Mr. Serjt. *Peake* (*a*), as supporting the decision in *Lockyer* v. *Jones*, and overruling *Mills* v. *Safford*.] — Both parties stand on their legal rights; the plaintiff claiming a larger sum for another lot of soap sold, while the defendant tenders less, and not in current coin. Then why should it be implied, that, because the plaintiff objected to the tender on one ground, he waived a legal objection to it on another, and thereby admitted bankers' notes to be a good tender? Such waiver, to be good, should have been express.

LORD LYNDHURST C. B. — I am of opinion that the tender was sufficient. The plaintiff's objection to it was not to the mode, but turned on its insufficiency in amount. The words of the plaintiff in *Tiley* v. *Courtier*, "the paper may be good for aught I know," assimilates that case to the present. In that case the decision of Lord *Kenyon*, in *Lockyer* v. *Jones*, was upheld, and that of the Court in *Mills* v. *Safford* overruled. I fully concur in Lord *Kenyon*'s opinion. Had the tender been objected to at the time, on account of being made in notes, the defendant might have at once changed them for current coin, which might then have been tendered. It was asked, if a tender in gold bars would be sufficient? That would be a tender of merchandize, and not of a matter ordinarily current as money.

BAYLEY B. — In order to constitute a legal tender, it should be made in the coin of the realm, which should be produced; (*b*) but the party, to whom the tender is made,

(c) Peake's C. N. P. 240. n.

(b) Tender if of more than 40*s*. must be in gold. 56 G. 3. c. 68. s. 11, 12. See s. 4.; and as to aliens, stat. 8 Hen. 6. c. 24. s. 1.

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may make an insufficient tender good by relying on a different objection. Thus, if he says he will not take the sum offered, and alleges that more is due to him, that dispenses with the production of the money (*a*) and cures its being offered in paper (*b*). If the plaintiff rests his objection to the tender on its being too small in amount, he misleads the defendant, who might have obviated the other objection to its quality. I consider *Lockyer* v. *Jones* to be good law. It was there decided, that if objection is taken to a tender of local notes, not on account of their character as such, but to the *quantum*, it cannot afterwards be objected that the mode of payment was improper: and there is good reason for that, for had the plaintiff said, "I will not have country bank notes," it would give the defendant an opportunity, either to change them and make another tender, or to produce legal money from his pocket. The defendant is deluded by another objection being insisted on, *viz.* his not offering enough. Nor does the argument, that the waiver in *Lockyer* v. *Jones*, and *Tiley* v. *Courtier*, was express, whereas here it was implied, make any difference in my judgment.

GARROW B. — I am of opinion that this tender became good by the plaintiffs not having objected at the time to the form in which it was made. I think that the great convenience to the mercantile world of a tender in this shape, renders it advisable to uphold Lord *Kenyon*'s decision.

(*a*) *Black* v. *Smith*, Peake 88. The production of the money seems the proper course, unless the plaintiff expressly say, that if produced he would not accept it, for otherwise if produced to him he might be induced to accept it. Per Lord *Kenyon*, *Dickenson* v. *Shee*, 4 Esp. C. N. P. 67. and see *Thomas* v. *Evans*, 10 East, 101.

(*b*) *e. g.* in a banker's check. *Wilby* v. *Warren*, Tidd, 187. 9th Edit. Buller J. Hil. 1788.

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BOLLAND B.—This appears to me to be a good tender, on the grounds stated by the rest of the Court.

Rule refused.

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## WOOD *against* BENSON.

A written guarantee by which defendant engaged to pay for all the gas which might be consumed at a theatre during the time it was occupied by *A.*, and also to pay for all arrears which might be then due, is void as to the arrears for want of sufficient consideration apparent on the face of the instrument; but the amount due for gas supplied subsequently to the date of the guarantee, may be recovered under an indebitatus count for goods sold.

*ASSUMPSIT*.—First count on the following guarantee:

"I the undersigned do engage to pay the directors of the *Manchester* gas works, or their collector, for all the gas which may be consumed in the Minor Theatre, and by the lamps outside the theatre, during the time it is occupied by my brother-in-law, Mr. *Neville*, and I do also engage to pay for all arrears which may be now due. Witness my hand this 10th *August* 1830."

(Signed by defendant.)

There was another count for goods and gas sold and delivered. At the trial before *J. Parke* J. at the Summer assizes for *Lancashire*, it appeared that 13*l*. 15*s*. 6*d*. was in arrear for gas supplied before the guarantee was given, and 15*l*. 4*s*. 6*d*. for supplies furnished since. For the defendant, it was objected, under the statute of frauds, that no consideration for the promise to pay the by-gone arrears appeared on the face of the guarantee, from which it was deduced, that the agreement being void as to part, was bad for the whole; and that the after-occurring demand could not be recovered.

A verdict for 29*l*. was directed, with leave to the defendant to move to enter a nonsuit.

A rule having been accordingly obtained by *Joshua Evans*,

*Wightman* shewed cause.—A sufficient consideration

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appears on the face of this instrument; for the future supply of gas is the consideration for both branches of the promise, *viz.* to pay the sum already due for it, as well as for the future supplies. If that is apparent on the whole of the instrument, it does not signify in what part of it it occurs. In *Russell* v. *Moseley*, (*a*) the guarantee was of "the present account of *H. M. due to S.* of 112*l.* 4*s.* 4*d.*, *and what she may contract* from this date to the 30th *September* next." That guarantee is so nearly similar to the present, that unless wrongly decided, the judgment in that case must prevail. Here the consideration for incurring a future debt was the payment of a prior one.

At all events, the plaintiff is entitled to recover 15*l.* 4*s.* 6*d.* for the gas furnished after the guarantee, on the *indebitatus* count for goods sold and delivered. These items were at the trial kept separate in proof. The promise to pay for future supplies of gas was not a collateral promise to pay for goods furnished to another, on which the plaintiff was bound to declare specially, (*b*) but an original order on a contract by defendant for a future supply of gas, and a promise to pay for it. Had the written engagement concluded with the undertaking to pay for the future supply, no special count would have been necessary. Then is that contract void, because the written evidence of it also contains a promise to pay the by-gone debt of another?—[*Bayley* B. There may be two agreements under one bargain.]—The promise to pay the arrears was the only one which required a special count, and if no sufficient consideration appears on the face of the instrument, the plaintiff cannot recover on that count. But that will not affect the count for goods sold. On the last point, then, this case may

(*a*) 6 B. M. 521. 3 B. & B. 211.

(*b*) See 1 Saund. 211. a. *Buckwyr* v. *Darnell*, Ld. Ray. 1085.

be distinguishable from *Thomas* v. *Williams*, (*a*) as also from *Lexington* v. *Clarke*, (*b*) and *Chater* v. *Beckett* (*c*) there cited, in which cases a special promise being essential to be laid and proved, one part of the special promise turned out to be void, and incapable of proof, from want of a written instrument; so that a variance existed between the pleadings and proofs, in stating more than could be established in evidence. Besides, in the cases on which *Thomas* v. *Williams* is founded, the party to be charged deriving no benefit from the transaction, could only be liable on his special promise, and the party to whom the promise was made, was to do some act. In all three cases, the undertaking was verbal merely.

*Blackburn* in support of the rule.—The defendant, if bound at all, is only bound by his agreement, *viz.* to pay for the supply of gas, not to himself, but to be consumed at the theatre, which was in the hands of a third person. A consideration, then, must be apparent, and cannot be left to inference only. Suppose *Neville*, the brother-in-law, had refused to take the gas to be supplied, could the plaintiff have recovered the arrears? Then if the consideration is good as to part, it is good as to all; and the plaintiff might recover, though no gas had been supplied. It can only be inferred that the *Manchester* gas works were bound to supply the gas, but then no mutuality of contract appears.

In *Lees* v. *Whitcomb*, (*d*) there was as much reason to imply an executed consideration as here, but the Court decided on its not appearing. There a promise in writing, to remain with the plaintiff two years, for the purpose of learning a trade, was held not binding for want of mutuality in a corresponding promise to teach. As

(*a*) 10 B. & C. 664.
(*b*) 2 Vent. 223.
(*c*) 7 T. R. 201.
(*d*) 5 Bing. 34. T. 1828.

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without an apparent undertaking to teach, no learning could be implied, so without an apparent undertaking to supply gas, no consumption can be inferred. Its being "turned on," is synonymous with its supply. But in *Lees* v. *Whitcomb* no obligation to teach appeared, so that the continuing consideration for the defendant's stay for two years did not appear. The consideration there was not executed, and never might be. Reciprocity of consideration was there necessary to the action for quitting within the two years.

The agreement is entire. Then if it can only be sustained as to the subsequent supplies, it is bad in part, and void *in toto*; so that the plaintiff cannot recover any thing. *Lexington* v. *Clarke*, *Chater* v. *Beckett*, *Thomas* v. *Williams*, *Cooke* v. *Tombs*, (*a*) *Lea* v. *Barber* (*b*).

[*Bayley* B.—The latter case turned on the nature of the contract, by which the purchaser was to have the brick ground, and take the stock with it, so as to have all or none; and did not turn on the naked point, that because the contract was void in part, for not being in writing, it was therefore bad *in toto*.

Lord *Lyndhurst* C. B.—In none of the cases cited were the whole of the special contracts declared on proved, and the objections to the plaintiffs' recovering were substantially on the ground of variance. Thus in *Thomas* v. *Williams*, the whole supposed contract was set out in the declaration, *viz.* to pay not only the rent due, but that to become due at the following *Michaelmas*. The latter part being void, for want of a contract in writing, the whole promise was not proved.

*Bayley* B.—The objection might have prevailed on the first count in this case, on the ground that the plaintiff was bound to prove the whole promise declared on. Here, however, there is a separate count, on which the

(*a*) 2 Anst. 420. (*b*) Id. 425. n.

plaintiff may recover for the subsequent supply of gas. In *Thomas* v. *Williams* the declaration was on one entire promise for payment of sums due for rent in arrear, and for rent to become due, without any separate count for either. Many cases shew the contrary of the proposition, that a promise void in part must necessarily be void *in toto; e. g.* where a bond is conditioned to do two things, one legal, the other illegal, the party may be bound to do the legal part, though the bond is void as to the latter. Is there any distinction *quoad hoc* between a bond and a promise? The judgment of the King's Bench in *Thomas* v. *Williams* was delivered by Lord *Tenterden* after consideration, and proceeded entirely on *Lexington* v. *Clarke*, and *Chater* v. *Beckett*.

Lord LYNDHURST C. B.—The decision in *Thomas* v. *Williams* may be supported on the ground that part of the contract in that case being void by the statute of frauds: the declaration there stated the entire contract, including the void part; so that the contract stated in the declaration was not proved. The cases of *Lexington* v. *Clarke*, and *Chater* v. *Beckett*, are sustainable on a like ground; and as in none of them was there any count on which the plaintiff could recover, there is no occasion to impugn those decisions. In *Thomas* v. *Williams* the contracts were so blended together, that in all probability they could not be separated. But in reading the present contract, it is separated into two parts; the first being precisely and distinctly, "I engage to pay for all the gas which may be consumed," &c. The other is in these terms: "And I do also engage to pay all arrears," &c. The latter engagement cannot be sustained, for if it is distinct and separate, it cannot be supported for want of consideration apparent on the instrument. (*a*) The question then arises on the

(*a*) See *Saunders* v. *Wakefield*, &c. &c.

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first engagement, Whether, if a man undertakes in writing to pay for goods which shall be supplied directly, and the goods are in fact furnished, though without any promise by the party so to do, a right to sue for the amount does not accrue? I am clearly of opinion that it does, and that the plaintiff is entitled to recover under the first part of this guarantee for the gas subsequently supplied. Accordingly, the verdict may stand for 15*l.* 14*s.* 6*d.*

BAYLEY B. — I am entirely of the same opinion. This contract consists of two branches, the latter of which, being for by-gone arrears, is not brought within the statute, and the cases which have established the necessity for a consideration apparent on the face of the instrument, by which the debt of another is to be answered for. But I am of opinion that there is no objection to that part of the contract for supplying gas, which was executed after the guarantee. A contract may be good in part, and bad in part, and is not of necessity void as to one part, because it is void as to another. So of bonds given for different purposes, some legal, some illegal (*a*). Many cases have drawn a distinction between contracts, of which a part is illegal at common law, and a part is rendered so by statute. The whole instrument has been held invalidated by the statute affecting part, "for a statute is a strict law, but the common law doth divide according to common reason, and having made that void that is against law, lets the rest stand." (*b*) Then

(*a*) *Pigot's* case, 11 Rep. 27. b. *Newman* v. *Newman*, 4 M. & S. 66. *Greenwood* v. *Bp. of London*, 5 Taunt. 727. 1 Marsh R. 292. S. C. And see 14 H. 8. 15. *Mosdell* v. *Middleton*, 1 Vent. 237. cited in *Chesmer* v. *Nainby*, Lord Ray. 1459. S. C. Stra. 744. *Folkes* v. *Dominique*, Stra. 1138. *Pearson* v. *Humes*, Carter, 229.

(*b*) *Morton* v. *Simmes*, Hobart, 14. *Fetherston* v. *Hutchinson*, Cro. El. 199. 11 Rep. 27 *b*. 1 Saund. 66. *a*.

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if a declaration is so framed as to apply to and sustain the proof of the valid part of a contract partly void, it by no means follows, that because an action could not be sustained for the whole, it cannot for that part. The doctrine in *Chater* v. *Becket* may go beyond the mere principle of variance, but in that case, as well as in *Thomas* v. *Williams*, the declaration stated as well the void as the binding parts of the entire promise; so that the promise alleged being entire, there was a failure of proof in that part of each case which required a writing within the statute of frauds. The same observation applies to the other cases cited to shew that the contract, if void in part, was void *in toto*. Those cases then may be sustained on the ground of failure to prove the contract alleged, but do not establish decisively that, if the good part can be separated from the residue, the good part may not be enforced by action.

GARROW B. concurred.

BOLLAND B.—This contract consists of two parts (his lordship stated them). The supply of gas having taken place before the guarantee, it is natural to suppose that after that additional security for a future supply was given, that supply should be continued to the theatre while *Neville* held it. Then if it could be held sufficient to shew a mutuality of contract between the plaintiff and defendant, the plaintiff might recover on all; but for want of consideration apparent on the face of this instrument, his right is confined to that supply of gas after the guarantee given, which he may recover on the count upon an executed consideration.

Rule for nonsuit discharged. Verdict reduced to 15*l.* 4*s.* 6*d.*

## ANTHONY v. WALTER REES and ROBERT REES.

A testator seised in fee of a house called *Plaesbach*, devised it to his granddaughter *Mary*, remainder on her death without issue, to her brother *Walter*. Then after several other devises to other grandchildren, he gave and bequeathed to his wife "*the sum of 20l. yearly and every year as long as she lives, to be paid out of the freehold estates, and the lease of Penylan, by trustees hereinafter named*, and at the same time notwithstanding there will be nothing to the grandchildren as long as their grandmother lived." By the last clause the testator appointed two persons "as trustees to look in that justice should be duly administered between the said parties." The granddaughter died without issue in the testator's life. The wife survived him.

Held, that the legal estate in *Plaesbach* did not vest in the grandson *Walter*, but in the trustees.

REPLEVIN. Avowry for half a year's rent due to *Walter Rees*, on 25th *March* 1830. Pleas in bar, *non tenuit*, and *riens in arrear*.

Plaintiff had lived several years at *Plaesbach*, as tenant to *Griffith Thomas*, maternal grandfather of the younger defendant, who died in *December* 1829, possessed of property, of which the house *Plaesbach* was part, having made the following will, dated 18th *May* 1829, and duly signed, attested to pass real property.

"I, *Griffith Thomas*, of &c., give and bequeath to my daughter, *Mary*, the wife of *John Morgan*, of &c., the sum of 6*l.* yearly, and every year as long as the lease will last, *to be raised* out *of the profits of the lease of Penylan*, and further, I give and bequeath to my above-named daughter, *Mary*, the house called *Tumble*, after the deceased of her mother, my well-beloved wife, to be freely possessed and enjoyed as long as she lives, and after her decease to my grandson, *Griffith Evans*, his heirs and assigns for ever, together with the two meadows belonging thereto, and further to my grandson, *Griffith Evans*, one bedstead, &c. Ditto, (*a*) *I give and bequeath to my grand-daughter, Mary, the daughter of Robert Rees, gent., the house called Plaesbach, where widow William Anthony, now lives, and if it happens that she dies without issue, then*

(*a* As to this word, see Vin. Ab. Devise (Q.a.). 1 Roll. Ab. 844. 1 Mod. 100. *Doe* v. *Westley*, 4 B. & C. 669. *Hopewell* v. *Ackland*, Salk. 239. *Price* v. *Archbishop of Canterbury*, 14 Ves. 364.

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*I give and bequeath the said house to her brother, Walter Rees, to be freely possessed and enjoyed, his heirs and assigns for ever.* Ditto, To the above-named *Walter Rees*, the house where *David Davies*, smith, now lives, to be freely possessed and enjoyed, his heirs and assigns for ever. Ditto, To *Mary Jenkins*, my grand-daughter, the house where *Margaret David*, widow, now lives. Also(*a*), the house where *James Maddock*, smith, now lives, between my two grand-daughters, *Mary* and *Margaret Jenkins*. Ditto, To *William Evans*, the house where *Walter*, the weaver, now lives, and the smith's shop on the mountain. Ditto, To my grand-daughter, *Mary Jenkin*, one feather-bed, with the appurtenances, and one half chest, after the decease of my well-beloved wife, and if she shall happen to die without issue, then, I give and bequeath the same to her sister, *Margaret*. And, *further, I give and bequeath to my well-beloved wife, the sum of twenty ponnds yearly, and every year as long as she lives, to be paid out of the freehold estate, and the lease of Penylan, by trustees, hereinafter named, and at the same time, notwithstanding there will be nothing to the grandchildren as long as their grandmother lives, and all just debts are paid.* And, further, if it shall happen that either of my two daughters happens to die in the lifetime of their husbands, then and there my two sons-in-law are to find sufficient security for the goods and chattels they have in their possession, by the trustees to be kept safe to the children of the deceased, and if he or they refuse to give security to the trustees for the same. And, further, I do ordain and impower my under-named *trustees to take possession, that the whole of my goods may be kept safe for my grandchildren*, and be divided between them, share and share alike, and my two daughters to be two executrixes of this my last will and testament, to have and to hold all and singular my goods and chattels, *except as before excepted.* And further, if any of my rela-

(*a*) See note in preceding page.

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tions shall at any time cause any trouble to the trustees, I do utterly cut them off from any benefit of this my last will and testament. And further, at the same time, I do hereby nominate *and appoint my trusty friends, Morgan Rees*, gent., *of Rhydycedrig*, and *Phillip Walton*, of *Cappel, as trustees, to look in that justice should be duly administered between the said parties.*

At the trial at the last *Summer* assizes for the county of *Carmarthen*, the question was, Whether the defendant, *Walter Rees*, took the legal estate in the house called *Plasbach*, under the above will of his grandfather?

*Mary Rees*, the daughter of testator and sister of *Walter Rees*, died in the lifetime of their grandfather without issue; and the testator died in *December* 1829, leaving a widow who was alive at the trial.

*Bosanquet* J. was of opinion that the trustees, *Morgan Rees* and *Philip Walton*, took the legal estates under the will of the grandfather, and directed a verdict for the plaintiff, giving the defendant leave to move to enter a nonsuit.

*Maule* obtained a rule accordingly. — He mentioned that a variance was contended for at the trial, the avowry being for half a year's rent due 25th *March* 1830, whereas the grandfather, having died no longer before than the *December* previous, the defendant *Walter Rees* could not have been entitled before that period; but the Court said, that as the plaintiff occupied for part of the year for which half a year's rent would become due, the devisee *Walter Rees* would have been entitled to the whole rent claimed on an avowry at common law stating the grandfather's death and devise to him, and thought the verdict could not be sustained on that ground.

*Russell* Serjt. *John Evans* and *Malkin* shewed cause. — The trustees being to pay the annuity to the widow out

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of freehold land, the question is, Whether the legal estate is given to them? The law will imply such an estate to be in them as is necessary to perform the trusts which are created for them to perform; *Trent* v. *Hanning*, (*a*) where Lord *Ellenborough* says, "To be sure, trustees must in all cases be presumed to take an estate commensurate with the charges or duties imposed upon them." The other side will argue, that no estate having been given, none can be implied; a case very different from those where the estate taken by trustees has been cut down by implication, to suit the estate they ought to take. But *Trent* v. *Hanning* is in point in answer. Testator there devised to his widow 200*l.* *per annum* for life, in addition to her jointure secured on real estate by deed previous to marriage, testator's debts being previously paid, and 6000*l.* to each of his younger children, payable on their attaining twenty-one respectively, and then by the next clause appointed *A.*, *B.*, and *C.* "*as trustees of inheritance* for the execution thereof." The Master of the Rolls sent the case to the Common Pleas, where it was argued by the present Mr. Baron *Bayley* for the plaintiffs. The certificate being in favour of the defendants, (*b*) and Lord *Eldon*, before whom the case came on for further directions, being dissatisfied with it, the case was again sent for the opinion of the Court of King's Bench. The majority of that Court held that the trustees took a fee in the lands devised. (*c*) *Lawrence* J. shews by his certificate, that he differed from the other judges, on the grounds that the will did not refer at all to the testator's lands, that nothing shewed that the annuity was to be paid out of them, and that the expression of *inheritance* used in the will, was too uncertain to pass the estate in disinherison of the heir. The Lord Chanceller coincided with the majority of the King's Bench, and decreed

(*a*) 7 East, 99. (*b*) 1 New. R. 116. (1804.)
(*c*) 7 East, 97. 105. (1806.)

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that the trustees took a fee. The case was heard in the House of Lords on appeal, who decided it in the same manner. (*a*) The implication of estate in the trustees made in that case, went much further than is here requisite, for the freehold estate was not charged in express terms, as here, or even mentioned; but the implication proceeded on the jointure of the wife, secured on the real estate, and on the words "trustees of inheritance." In *Oates* v. *Cooke*, (*b*) the testator, seised in fee of the land in question, gave several legacies, and then directed "these legacies to be faithfully paid by my trustee, *John Cooke*, every year." He also bequeathed "unto my trustee and executor, out of the yearly rents of the farm, 1*l.* 10*s.* a year and yearly," for repairs, &c. of a farm; also, "5*l.* to build a tomb for me—*he and his heirs* always to see that it be kept in order;" and in the last clause, "And I do hereby constitute *John Cooke*, before mentioned, sole executor and trustee of this my last will and testament, he paying all my just debts, legacies, and funeral charges." The Court thought it quite clear that the trustees took a fee, Lord *Mansfield* saying he had not a particle of doubt, and *Wilmot* J. adding, "No particular technical terms are requisite; it is sufficient if the implication be strong, violent, and necessary. Nowhere are trusts to be executed, which the trustee could not execute and effectuate without having an estate in fee devised to him." *Yates* J. said that the estate must be co-extensive with the charges, *viz.* annuities charged on the real estate, and devised in fee. How in this case could the 20*l.* a year be paid out of the freehold, unless the trustees took a legal estate? Whatever estate was here given, is here also continued; so that no question arises whether the estate given to the trustees is at an

(*a*) 1 Dow's R. 102. nomine *Trent* v. *Trent* and Others.

(*b*) 3 Burr. 1684.

end. *Jenkins* v. *Jenkins* (*a*) meets any observation that the annuity was to be paid *out of* certain lands, the same words being used in that case as in this. *Doe d. Leicester* v. *Biggs* (*b*) and *Doe* v. *Woodhouse* (*c*) are also in point.

*Maule* and *E. V. Williams* in support of the rule.—On first reading this will, it appears difficult to see how *Walter Rees* or his sister could take no estate at all in *Plaesbach*, which is expressly devised to them in succession, in terms which carry the legal estate. The question will be, whether this will, containing an express devise of a legal estate, is to be so construed, as by implication to annul it? The cases cited do not bear out the position set up by the other side, in the generality contended for. Thus it appears from the report of *Oates* v. *Cooke*, in *Blackstone*'s Reports, (*d*) that one of the several annuities bequeathed was given to the heir, which clearly shewed he was not to take, and there being no devise over, or express devise, as in this case, nobody else could take, except the trustee. In *Trent* v. *Hanning*, the whole Court of Common Pleas and Mr. Jus. *Lawrence* differed from the judgment of three judges of the King's Bench, and the Lords *Eldon* and *Redesdale* treated the case in the House of Lords as one of great doubt. There, had the word "my" preceded "inheritance," the trustees would have been clearly referred to the landed property. But in this case, trustees are appointed "to see justice done," *viz.* to form a kind of domestic tribunal. In *Trent* v. *Hanning* the trustees were to perform various duties, which could not possibly have been done without their taking a fee. Nor in that case was there any devise over. In *Doe* v. *Woodhouse*

(*a*) Willes, 650. (*b*) 2 Taunt. 109. (*c*) 4 T. R. 89.
(*d*) W. Bla. 543.

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there was no express disposition of the property after the wife's death: an annuity is given to the heir at law, and the trustees were to pay debts, &c. out of the whole estate. That case is very distinct from the present, as a necessity existed for the trustees to take a fee.

In the absence of clear expression, implication is a twilight to discern the intention; but *expressum facit cessare tacitum*. From *Bamfield* v. *Popham* (*b*) it appears that words, however potent by way of implication to raise a particular estate, should never control what was before distinctly expressed in the will. Here an express legal estate passed by the devise to *Walter Rees* and his sister.

[Lord *Lyndhurst* C. B.—Suppose the latter clause to confer an estate in fee on the trustees, in terms so as to enable them to execute the trusts, would not that be consistent with the former devise? The will would then contain a substantive devise of the legal estate, and the only way to reconcile all parts of it will be, to give the trustees the legal estate in fee, and the equitable estate to the parties beneficially interested.

*Bayley* B.—It is difficult to say the *express legal estate* is given by the devise to *Walter Rees*, for the testator uses words applicable to either a legal or equitable estate.]

The Court is not driven to imply a fee in the trustees by the impracticability of executing the will without that construction, for the will may be carried into effect without. These persons are not appointed simply trustees, or "trustees of inheritance," but are simply mentioned as trustees *to look in and see* justice done between the parties. The whole scope of the will shews that the framer of it, a village schoolmaster, had probably in his mind the supervisors or overseers of a will, who were

(*a*) Hil. 1702. 1 Peere W. 56.

formerly appointed to overlook the trustees and executors. (*a*) Those persons could not otherwise intermeddle than by counsel or advice, or complaining in the Spiritual Court, and were looked on as mere candle-holders, while the executors told the deceased's money. (*b*)

Again, the charge on the estate for payment of debts and of an annuity to testator's widow is good, without implying any estate in the trustees. After the express devise to the defendant *Walter Rees*, the only implication consistent with it, or necessary to be made, is, that the trustees shall be seised of the rentcharge in trust for the widow, with power to enter and distrain for it if necessary, and pay it over to her.

[Lord *Lyndhurst*.—What, in that case, would be the use of interposing trustees?

*Bayley* B.—If you give an estate to *A*. in trust to permit *B*. to *receive* the rents, the legal estate is in *B*.; (*c*) but if the estate is given to *A*. in trust to *pay* over, the legal estate is in the trustees. (*d*) A distress is a hazardous and circuitous mode of raising the money, compared with the receipt of the rents by the trustees in right of the estate vested in them, with power to pay them over according to the will.]

The nature of the estate taken by the trustees, in order to perform their functions, may be well illustrated by Lord *Eldon*'s observation in *Wilkinson* v. *Adams*: (*e*) "With regard to that expression, *necessary implication*, I will repeat what I have before stated, from a note of Lord *Hardwicke*'s judgment in *Corriton* v. *Helbier*, (*f*)

(*a*) See *Jacob's* Law Dict. tit. Supervisor.

(*b*) 4 Burn's Ecc. L. 126. *Tyrwhitt's* Edit.

(*c*) *Harton* v. *Harton*, 7 T. R. 652. and see the cases collected, 2 Saund. 11. b.c. d. in notes to *Jeafreson* v. *Morton*.

(*d*) Ibid. and see *Garth* v. *Baldwin*, 2 Ves. 646.

(*e*) 1 Ves. & B. 466.

(*f*) 2 Cox, 340. cited 4 Bro. C. C. 460. 2 Burr. 923. 3d Edit. 1631.

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that in construing a will, conjecture must not be taken for implication, but "necessary implication" means not natural necessity, but so strong a probability of intention, that an intention contrary to that which is imputed to the testator cannot be supposed.

Lord LYNDHURST C. B.—This question has arisen on the devise by the testator to his grandaughter *Mary* "of the house called *Plaesbach*, where widow *William Anthony* now lives," and if it happens she dies without issue, then the house is given to her brother *Walter Rees*, to be freely possessed and enjoyed, his heirs and assigns for ever. Had the will stopped here, it is clear that the legal estate would have passed to the granddaughter, with remainder to the defendant *Walter Rees*. But all the will must be taken together, and in a latter part of it the testator says, "I give to my wife the sum of 20*l.* yearly and every year, as long as she lives, to be paid out of the freehold estate and the lease of *Penylan*, by trustees hereinafter named, and at the same time, notwithstanding there will be nothing for the grandchildren as long as their grandmother lives." Thus the estate previously conferred was, and must be taken to have been given subject to the proviso in this subsequent clause. Now the trustees appointed by the last clause of the will cannot do their duty without being in possession of the estate; for if the rents amount to more than will pay the widow's annuity of 20*l.*, they must pay the surplus over to the grandchildren, the ultimate objects of the testator's bounty. Then the legal estate is, and must be, given to the trustees, in order that they may execute their duty, and both provisions in the will may be reconciled, by giving the grandchildren a beneficial interest, to take after the annuity of 20*l.* is satisfied.

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BAYLEY B.—I am of the same opinion; and I think that by the construction we thus adopt, we give the right effect to every part of the will, which we should not do if we assented to that which has been suggested on the part of the defendants. We are to look to all the parts of the will, and if that which appears absolute in one part is subsequently qualified in another, we should give effect to that qualification.

Here the estate in question was given to the granddaughter, and if she died without issue, (*a*) to the grandson *Walter Rees*: now if the will had ended there, the devise would have been an unqualified devise to *Mary*, with remainder to *Walter*. I cannot say that it is an *express* devise of the *legal* estate, for no words appear amounting to that; and the argument that an express legal estate is given, seems to me unfounded. Is there then any subsequent qualification? Suppose that the words "subject to the qualifications hereinafter mentioned" had been introduced into the devise to the grandchildren, we must have regarded them; and yet those words, though not used, are in every will necessarily implied. Then consider what is the qualification here to be found. Testator gives and bequeaths to his wife (not to trustees, in order that they might take a rentcharge, as was argued,) the sum of 20*l.* yearly, to be paid out of the freehold estate and the lease of *P.*, by trustees thereinafter named; and at the same time, notwithstanding there would be nothing for the grandchildren as long as their grandmother lived, and all just debts were paid. Whether the provision to pay debts gave a legal estate to the trustees for that purpose or not, they are directed to do acts which they cannot per-

(*a*) Quære, if *Mary* took an estate tail. Perk. s. 173. cited by *Powell* J. *Bampfield* v. *Popham*, 1 P. W. 56. acc. and see *Sunday's* case, 9 Co. 127. b but dub. per Lord Keeper *Wright*; and see Vaugh. 259. and *Fisher* v. *Wigg*, 1 P. W. 14. that she took an estate for life only.

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form without having the legal estate in the premises vested in them by implication. How can they pay the annuity out of the freehold estate, but by receiving the rents and profits, and paying it out of them? The surplus rents would be to be proportionably divided among the grandchildren.

It is said that it would be quite sufficient for effecting the objects of the will, if the trustees were to have a power of *entry* and distress for the rentcharge, so as to have no necessity to imply a legal estate in the lands; but as that construction would merely drive the trustees and the widow to the necessity of distraining or going to a court of equity for payment of arrears, I am of opinion that the testator did not mean the trustees to have such a limited interest. Many cases shew that where trustees are to pay out of the lands devised, they must take the legal estate. It may turn out that the general expression in *Bampfield* v. *Popham*, (*a*) "that where there is an express estate limited, no implication ought to be admitted to control it," ought to be taken in the confined sense which the facts of that case necessarily imply, *viz.* where the whole estate has been exhausted by previous limitations. There *A.*, seised in fee, devised to trustees and their heirs, to the use of them and their heirs, in trust for *Popham* for life, remainder to his first son, &c. in tail male, *and for want of issue male* of *Popham*, remainder over. There, had *Popham* been held to take an estate tail by implication, the previous express limitation to him for life only would have been utterly useless, and he might have barred the remainders. That decision pronounced in effect that a son of *Popham* never could have issue male not expressly provided for.

On the whole, I am of opinion, that in this case the legal estate vested in the trustees, such an amount of

(*a*) 1 Peere Wms. 54 & 56.

interest being necessary to carry the objects of this will into effect. *Doe* v. *Woodhouse* (*b*) goes nearly the whole length of this case.

GARROW B. concurred.

BOLLAND B.—As to the argument that the trustees mentioned in this will were only meant to be supervisors or friendly arbitrators, constituting a sort of domestic forum, if we look at the earlier parts of the will, we shall find that the trustees are mentioned again and again, and duties are assigned to be performed by them as such. Thus they are to take security for the personalty if it became necessary, according to the dispositions of the will, and to take possession of it for the benefit of the legatees. It is not till after these directions that the words of supervision, "to look in and see that justice be duly administered," are introduced. *Doe* v. *Wood-house* is not distinguishable on principle. Considering it impossible that a less estate could pass to the trustees than was necessary to enable them to perform their duties, I am of opinion that the legal estate in *Plasbach* vested in them, and not in *Walter Rees*, the defendant. This rule must therefore be discharged.

Rule discharged.

(*a*) 4 T. R. 89.

## MILLER *against* BOWDEN.

**Process on which the day of the month and year are not indorsed pursuant to *Reg. Gen. Mich.* 1 W. 4. will not be set aside on that account, that rule being merely directory.**

A RULE had been obtained by *Channell* to set aside the service of a *quo minus* for irregularity, with costs, the date of the month and year on which it was issued not being indorsed on the process, according to *Reg. Gen.* M.T. 1 W. 4. (*a*)

*John Jervis* shewed cause, citing *Coleby* v. *Norris*, (*b*) where on a like motion it was held that the date indorsed on the copy of a writ served, is no part of it, and that the teste being right, it was sufficient. The rule of court does not direct any indorsement on copies. He also insisted, that since notice of the motion given, the plaintiff's attorney had offered to pay the costs of the amendment if the mistake were pointed out, and that if the rule were made absolute, the defendant must pay all costs incurred after that offer. *Beeston* v. *Becket*. (*c*)

*Channell* supported his rule on the grounds of the importance to a defendant to know the day when the process issued, *e. g.* to his pleading to a tender or statute of limitations, and that he was entitled to know that from the indorsement on the process, and not by the trouble of searching the office.

Lord LYNDHURST C. B.—The rule of court is merely directory, and the irregularity in this process is not such as calls on us to set aside the service; but as it is

(*a*) Vol. I. Appendix, p. iv.
(*b*) 1 Wils. 91.
(*c*) 4 M. & R. 100.

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the first application since the rule of court, this rule should be discharged without costs.

BAYLEY B.—In *Shaw* v. *Evans*, (*a*) the court of King's Bench held that a rule of court of *Mich.* 42 G. 3. requiring a defeazance to be written on the same paper on which a warrant of attorney is written, was merely directory, and that the instrument was not avoided by that defect.

Rule discharged without costs. (*b*)

(*a*) 14 East. 576.

(*b*) This case occurred in Trinity Term, 1831, but was inadvertently omitted from the report of that term.

## ALLEN *against* MILNER.

Indebitatus assumpsit for a debt of 50*l.* Plea that differences having arisen between plaintiff and defendant

INDEBITATUS assumpsit for 50*l.* for turnpike tolls; with the money counts.

Pleas, 1st, the general issue; 2d, to the count for tolls that after the making of the promise and undertaking, (*c*) and before the day of the exhibit-

*touching the said claim*, the matter in difference was referred, and an award was made by which 13*l.* only was directed to be paid by plaintiff to defendant; without averring performance of the award by payment of that sum. Plea held bad on demurrer, being no answer to the action for a *debt*, such debt and its amount being all that was referred, and the award being for payment of money and not for performance of any collateral act.

(*c*) Defendant by pleading the award after the promises made, admits plaintiff to have a cause of action on the promises, but relies that he is barred by the award, and an admission even of a colour of action is sufficient to prevent the pleading from amounting to the general issue. Carth. 188. *Crofts* v. *Harris*.

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ing the bill of the said plaintiff against him the said defendant, to wit on the 26th *Sept.* 1829, in the county, &c. differences having arisen, and being depending between the plaintiff and the said defendant, touching and concerning thesaid claim in the said first count mentioned they mutually submitted themselves to refer, and did then and there refer *the said matter in difference* to the arbitration of *W. H.* and *T. F.;* and in case they should not agree, then to the umpirage of *T. P.*, and the decision of the umpire to be final; and the defendant averred that afterwards, to wit, on the day and year last aforesaid, in the county aforesaid, in consideration that the said defendant had then and there undertaken, and faithfully promised the plaintiff to perform and fulfil all things in the said submission contained, and in the said award or umpirage to be contained on the part of the defendant to be performed and fulfilled, he the said plaintiff undertook, and then and there faithfully promised the defendant to perform and fulfil all things in the said submission contained, and in the said award or umpirage to be contained on his the said plaintiff's part to be performed and fulfilled; and the defendant further said, that the said arbitrators not having agreed upon the matter so referred to them, the said umpire thereupon in due time, to wit, on the 24th *Oct.* in the year aforesaid, in the county aforesaid, took upon himself the burthen of the said arbitration and umpirage, and having duly examined and considered the said subject matter in difference between the plaintiff and defendant, the said umpire did make his award and umpirage in writing, under his hand, of and concerning the premises, and did thereby then and there award and declare that the defendant should pay the plaintiff the sum of 13*l.* as by the said award, reference being thereunto had, will more fully appear, and this the defendant is ready to verify, &c.

Special demurrer, stating the following causes: — That the defendant hath not in and by his said plea shewn performance of the said award by the payment by him the defendant to the plaintiff of the said sum of 13*l.* in that plea mentioned; and that defendant hath not shewn satisfaction for the non-performance of the said promise and undertaking, and that the plea amounts to accord only without satisfaction.

Joinder in demurrer.

*Cooling* for the plaintiff supported the demurrer.—This amounts to a plea of confession and avoidance, see per *Denison* J. *Addersley* v. *Evans* (*a*); but though it admits 50*l.* to be still due to the plaintiff, and avers that 13*l.* was awarded to be paid by the defendant to the plaintiff, it does not avoid by shewing performance of the award by payment of that sum. It thus alleges accord without satisfaction, for the 13*l.* awarded cannot be considered in law as a satisfaction of the larger debt demanded in the first count. Supposing even that the plaintiff is estopped by his submission to arbitration, from claiming more than the sum awarded, and that the case stood as if the 13*l.* only was originally due, the plea would be bad for the like reason. Nor if it had so stated payment would it have been any answer, for there would be no satisfaction in damages for the non-performance of the promise between the time when the money was found to have become due and the time of payment. The umpire does not profess to award interest or satisfaction for that interval, having no power to do so under the submission, which only authorized him to inquire whether the 50*l.* claimed by plaintiff, or any other sum was due. He was in fact more an accountant than an arbitrator. Such a plea, though good if pleaded by way of payment after the day of payment, is bad if pleaded

(*a*) 1 Ld. Kenyon, 250.

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by way of accord and satisfaction. *Holroyd* J. in *Francis* v. *Crywell* (*a*) says, "It was decided in *Perry* v. *Odingsell* (*b*) that payment after the day is good by way of discharge but not of satisfaction. Here upon the whole record it appears that the plaintiff had a cause of action in respect of which he has sustained a damage which is yet unsatisfied. The defendant ought to have pleaded that the money was paid in satisfaction of the damages sustained by the non-performance of the promises." So that if the plea here was that the 13*l.* awarded had been paid, it would be pleaded by way of satisfaction of all or part of the claim, and not by way of payment. Now an *accord* must appear to be advantageous to the party, otherwise it can be no satisfaction, therefore in trespass for taking cattle, it is no good plea to say that there was an accord that the plaintiff should have his cattle again, for that is not any satisfaction. (*b*) So here it is no good plea to say that by an award the plaintiff shall have 13*l.*, which the arbitrator finds to have been due.—[*Bayley* B. That sum might have included damages as well as the sum originally due.—Lord *Lyndhurst* C. B. The only point in dispute on the pleadings is, Whether there has been payment or not?]

Secondly, The plea is bad, because it does not aver a payment of the 13*l.* which allegation might have made it an informal plea of payment. Had the action been originally for 13*l.*, a plea that the umpire, after examination of the case, had awarded that sum to be paid, could not have been a discharge, for the award gives nothing for the detention of the debt, and nothing which the plaintiff had not a right to before the debt became in arrear. This case is one in which the claim mentioned in the plea is ascertained, and is quite different from an action for unliquidated damages; for here the plaintiff not only complains that

(*a*) 5 B. & A. 888. (*b*) 4 Mod. 250.

(*b*) Bac. Abr. Accord and Satisfaction, A.

13*l.* was due, but that it was detained; whereas there, as no detention of any particular sum for a certain time could exist, a reference of the claim to arbitration includes every thing, and the plaintiff if barred of his right of action has an equivalent.

At all events this plea is ill pleaded to the whole sum claimed in the first count, viz. 50*l.*, whereas the correct course would have been to plead the general issue *non assumpsit* as to that sum, except 13*l.*, and as to that, to have pleaded specially. *Thomas* v. *Heathorn* (*a*), *Kearslake* v. *Morgan* (*b*).

*Chilton* contrà, in support of the plea. — No particular sum is confessed by this plea to be due. It states that differences existed, which were referred to arbitration. Then the amount of the claim was in dispute and not liquidated, and the sum awarded must be taken to include the plaintiff's claim and damages for its detention. But the question is, Whether a plea of arbitrament, where the award remains unperformed, will bar an action for the original claim? (*c*) An award, though not performed, may be a good plea in bar to a suit for the original cause of action, whenever the party has a remedy on the award to compel its execution, *Crofts* v. *Harris* (*d*), which was also in *assumpsit*, and contained a count for wares sold. *Freeman* v. *Bernard* (*e*) lays down the same position, "wherever the award gives a new duty in lieu of the former, for a submission implies a promise to perform, so that the party has a remedy for that which is awarded." An accord differs from an award in this, that it is no bar

(*a*) 2 B. & C. 477. and see Carth. 188. (*b*) 5 T. R. 513.

(*c*) See 1 Rol. Abr. 267. *Genne* v. *Tinker*, 3 Lev. 24. 1 Keb. 848. Cro. El. 66. Koilway, 121. Latwych, 281. 1 Saund. 324. n. (*a*)

(*d*) Carth. 187. and see *Parslow* v. *Baily*, Salk. 76.

(*e*) Salk. 69. *Quære*, if an award unperformed, though it gives a new duty, can be a good plea after the time of performance elapsed. *Ibid.*

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till executed; whereas an award is, if pleaded with mutual promises, because each party may have his remedy on the submission of the other. *Allen* v. *Harris* (*a*). An award is there compared to a judgment. — [*Bayley* B. A judgment extinguishes the original cause of action, an award would not.]

Lastly, *Gascoyne* v. *Edwards* and Another (*b*) expressly decides that arbitrament without performance is a good plea, when the parties have mutual remedies.

*Cowling* in reply. — *Gascoyne* v. *Edwards* was an action for unliquidated damages, for not repairing pursuant to covenant. In *Crofts* v. *Harris*, the reference being of all matters in difference, the award necessarily included the claim and damages for its detention. The original right of action revives on non-performance of the award, which had suspended it. In illustration, *Cramley* v. *Hilary* (*c*), shews that creditors who have compounded with a debtor, cannot sue him till he breaks his agreement, but are then remitted to their original rights.

*Cur. adv. vult.*

Lord LYNDHURST C. B. now delivered the jndgment of the Court.

This was an action of *indebitatus assumpsit* for tolls. Defendant pleaded as to the count for tolls, that differences had arisen between him and the plaintiff, touching the said claim, and they mutually submitted themselves to refer, and did refer the said matter in difference to arbitration, that they mutually promised to abide by the award, and that the umpire made his award of and concerning the said premises, and did thereby award that the defendant should pay to the plaintiff the sum of 13*l*.

(*a*) 1 Ld. Ray. 122.
(*b*) 1 Y. & J. 19. Exch. M. 1826.
(*c*) 2 M. & S. 120.

To this plea the plaintiff demurred specially, because the defendant had not averred payment of the 13*l.* or any other satisfaction of the plaintiff's demand.

The question, therefore, is, Whether this award is of itself, without payment or satisfaction, any bar? and considering the matter of the plaintiff's demand, and the nature of the award, we are of opinion it is not. The plaintiff's demand is for a debt, and the award is not for the performance of any *collateral* act, but for the payment of money. The matter, therefore, for the consideration of the arbitrator was, Whether there were any, and what debt? The award only ascertains that there is a debt, specifies the amount, and directs the payment; but the money, till paid, is due in respect of the original debt, *i. e.* for tolls. Its character remains the same; nothing is done to vary its nature, or destroy its original quality. Had the demand been of a different description, as for the delivery of goods, and had the award directed a payment of money in satisfaction of the demand, it might then have been said, that the award had changed the nature of the original demand, that the right remaining was the substituted right, *i. e.* the right to have the money; or had the demand been for a debt, and the award directed, not a payment in money, but payment in a collateral way, as by delivery of goods, performance of work, &c., it might perhaps have been said that the right to payment in money was gone; but here the 13*l.* is to be paid for the original demand, *i. e.* for the tolls, and it is to be paid, as that demand was to have been paid, *i. e.* in money. In *Crofts* v. *Harris* (*a*), the declaration contained three counts; one for not shipping and consigning cotton wool, one upon an *indebitatus assumpsit* for goods sold, and a conditional promise to pay in money, if the defendant did not ship and consign cotton wool to plaintiff; and the third upon a general

(*a*) Carthew, 187.

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*indebitatus assumpsit* for goods sold. Defendant pleaded a submission of all matters, and an award thereon, which he set out; but he did not allege performance on his part. What the matter awarded was, whether the payment of money, or the performance of any other matter, does not appear. It turned out on demurrer, that the award only related to the cotton wool, not to the other matters; so that it was pleaded to what it could not bar: and as to the cotton wool, it was conditional only, and therefore void. The plaintiff, therefore, had judgment, but *Carthew* says, the following diversities were taken by the court to be law: 1st, that an award without performance is a good bar to an action on the case, if the parties have mutual remedies against each other, to compel the execution of the matters awarded; and (after two other positions not bearing upon the case) that if the award in that case had been general, defendant might have pleaded it in bar of all the promises in the declaration, and it would not have amounted to the general issue. In that case, therefore, there was no decision upon the point. The position, that an award without performance would be a good bar to *an action upon the case*, would be within the distinction we have taken, if by an action *on the case* were meant, as it probably was, not an action for a debt, but a special action on the case for damages, and as we are not apprized what the award there was, it does not follow that because the award in that case would have been a good bar, the award here, which is only an award of payment, is.

In *Allen* v. *Harris* (*a*), relied upon in *Gascoyne* v. *Edwards* (*b*), it is certainly said by counsel, *arguendo*, that arbitrament may be pleaded without performance, because the parties may have reciprocal remedies, and the court is represented to have said, that "if arbitrament be with mutual promises to perform it, though the

(*a*) Ld. Raym. 122. (*b*) 1 Y. & J. 19.

party who brings the action has not performed his part, yet shall he maintain his action, because an arbitrament is like a judgment, and the party may have his remedy upon it." But this was not the point in judgment before the court, the defendant had pleaded not an arbitrament, but an accord, which was held bad, and the action was not an action for debt, but an action of trover. The case of *Gascoyne* v. *Edwards* admits (if not of both the answers we have named) clearly of the first, viz. that the demand was for general damages and not for a debt. The first count of the declaration we have ascertained from the pleadings, was covenant for not repairing; the award was pleaded to that count only, and it directed payment of 5*l.* for damages, the repair of the premises, and the quitting of them at a given period. That case, therefore, according to the distinction we have taken, does not govern the present, because the action there was not for a debt, but for general damages for not repairing. Upon the ground, therefore, that the present action is for a debt; that the award only ascertains the amount of that debt; and that the money payable under the award is nothing but the original debt, so ascertained in amount, we are of opinion that this plea is bad, and that the plaintiff is entitled to judgment.

Judgment for plaintiff.

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BEALEY *against* GREENSLADE.

ASSUMPSIT on a promissory note for 30*l.* with interest. The pleas were the general issue, and

**A payment made within six years of interest which had become due upon a note more than six years ago, is sufficient to take the case out of the statute of limitations, where the note remains in the hands of the payee.**

**Such a payment is within the proviso in 9 G. 4. c. 14. s. 1. and is therefore not affected by that act.**

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*actio non accrevit infra sex annos.* At the trial at the last Summer assizes for *Somersetshire*, before *Alderson* J. the following note was produced, and its amount was claimed with interest from 31st *March* 1824, to 31st *July* 1831.

"I do hereby promise to pay to the Rev. *Thomas Bealey*, or to his order, on demand, the sum of 30*l.* of lawful money of *Great Britain*, together with legal interest for the same, for value received, this 31st *March* 1817. As witness my hand, *Wm. Greenslade.*

Dated *Winsford, March* 31, 1817."

Indorsements on the note, in the plaintiff's handwriting, as follows:

"Interest paid to *March* 31, 1818.

Do. to *March* 31, 1820." And

"*Jan.* 16, 1826. Received of *Wm. Greenslade*, by payment of *H. Veysey*, 6*l.* being four years' interest due on this note on the 31st *March* 1824.

(Signed) *Thomas Bealey.*"

The plaintiff then called *Veysey*, who proved that by defendant's order he went to plaintiff, and paid him 6*l.* for four years' interest on the note, out of rent owing by *Veysey* to defendant, and that this sum was afterwards allowed by defendant to *V.* out of the rent. Witness did not know when the interest he paid had become due, and the last indorsement was relied on to take the case out of the statute of limitations.

For the defendant it was contended, that a payment within six years of interest due before that period, was not sufficient for that purpose; and only proved that a note once existed, the principal of which had been satisfied, leaving a portion of interest due on 31st *March* 1824, which was afterwards paid within the six years, for which the authority of *J. Parke* J. in *Sanders* v. *Meredith* (*a*) was relied on. The plaintiff had a verdict, the defendant having leave to move to enter a nonsuit.

(*a*) 4 M. & R. 121.

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*Follett* having obtained a rule *nisi*—

*F. N. Rogers* shewed cause.—Lord *Tenterden*'s act, 9 G. 4. c. 14. having no operation in this case, (*a*) the question is, Whether a payment within six years of interest due before that time, will be a sufficient acknowledgement to be evidence of a new promise within six years, so as to take the case out of the statute? *Sanders* v. *Meredith* was debt on bond, and the distinction between a debt on bond and a debt operated on by the statute is, that the question in the former case is, Whether the bond stands in force as an existing security?—while in the latter it is confessed that the original remedy is gone, and the question is, Whether any acknowledgement of the debt has taken place within six years? For in *assumpsit* the acknowledgement of the debt is evidence of a fresh promise, *per* Lord *Ellenborough*, *Hurst* v. *Parker* (*b*). In *Pittam* v. *Foster* (*c*) *Abbott* C. J. cites and approves that rule, shewing *ab inconvenienti*, that it does not draw down the original promise. In *Tanner* v. *Smart* (*d*) he again minutely reviews all the cases, and again acknowledges the rule so stated by Lord *Ellenborough*, that in *assumpsit* "an acknowledgement of the debt is evidence of a new promise." He goes on to say, that "that promise is considered as one of the promises laid in the declaration, and one of the causes of action which the declaration states." The reason why a part payment of the principal by one of several makers of a joint and several promissory note operates against the others as a new promise is, that it acknowledges the note to be unsatisfied. *Whitcomb* v. *Whiting*, (*e*) *Burleigh* v. *Stott*. (*f*)

(*a*) See proviso in s. 1. See s. 3.
(*b*) 1 B. & Adol. 93. (*c*) 1 B. & C. 230.
(*d*) 6 B. & C. 603. 606. (*e*) Doug. 651.
(*f*) 8 B. & C. 36. See also *Perham* v. *Raynal*, 2 Bing. 306. *Pease* v.

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In this case, the payment of interest in 1826 operates so as to re-produce the original liability which was before destroyed by the statute of limitations. A presumption is said to arise from the evidence, that the principal was paid before the six years, and that only interest remained due within that period; but if the effect of the evidence is to be discussed here, the continuance of the note in the payee's hands is conclusive, even within *Sanders* v. *Meredith*, that the note had not been satisfied by discharge of all that was due on it. *Catling* v. *Skoulding* (*a*) shews that each of the indorsements of interest is an entry against the plaintiff's interest, and admits some unsettled account between him and the defendant, so as to take the case out of the statute. He also cited *Bryan* v. *Horseman*. (*b*)

At all events, the fact of a general payment of interest in 1826 on this note, is evidence of a debt existing at that time. It is a general acknowledgement, and, as such, evidence of a new promise. *Willis* v. *Newham*. (*c*)

*Butt* for the defendant. — The facts proved do not take the case out of the statute. It is new in principle, and not within any of the cases cited; for in *Whitcomb* v. *Whiting*, *Burleigh* v. *Stott*, and *Pease* v. *Hirst* (*d*), the sums paid for interest had become due *within* the six years; those cases, therefore, do not apply. It is perfectly consistent with the facts proved, that the principal due on the note was satisfied, and that a claim for interest only remained; for a payment in

*Hirst*, 10 B. & C. 122. *Slater* v. *Lawson*, 1 B. & Adol. 396. *Jackson* v. *Fairbank*, 2 H. Bla. 340. *Brandram* v. *Wharton*, 1 B. & A. 463. *Atkins* v. *Tredgold*, 2 B. & C. 23.

(*a*) 6 T. R. 189.; but see 9 G. 4. c. 14. s. 3. as to such indorsement made after 1st *Jan.* 1829, by or on behalf of the party to whom the payment is made.

(*b*) 4 East, 599.

(*c*) 3 Y. & J. 516.

(*d*) 10 B. & C. 122.

in respect of interest will not necessarily imply that the principal is still due, and the converse; for *Collyer* v. *Willock* (*a*) shews that the claims for principal and interest may be severed. There the debt consisted of principal and interest; the defendant paid the principal into Court, but refused to pay the interest. The action went on for the interest, and on plea of the statute of limitations, the Court held that the payment of the principal did not raise any implied promise to pay the interest, so as to take the case out of the statute of limitations as to that claim. That case is in point for the defendant, for here there is no evidence of any claim for interest after 1824. No legal distinction seems to exist *quoad hoc* between payment of interest on a bond, as in *Sanders* v. *Meredith*, and on a note, as here; though the presumption of payment arises by implication of law on the specialty after twenty years, and is prescribed by statute after six years elapsed, in the case of simple contract debt. The possession of the note by the plaintiff is parallel to the same fact respecting the bond in *Sanders* v. *Meredith*, where *J. Parke* J. says, "Payment within twenty years, of interest which has accrued beyond the twenty years, is only proof that such a bond once existed."

Lord LYNDHURST C. B.—The effect of the proviso in 9 G. 4. c. 14. s. 1. being to leave this case as before that act passed, the question is, Whether, if interest due on a note more than six years ago be paid within six years, that payment is sufficient to take the claim for the principal out of the statute of limitations? Now the debt in this case is composed of principal and interest; a payment of interest is consequently a payment of a part of the debt. That payment having been made within the period of six years, coupled with the circumstance of

(*a*) 4 Bing. 313.

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the note remaining in the hands of the payee, is, I think, sufficient to take the case out of the statute of limitations. I am therefore of opinion that the verdict ought not to be disturbed.

BAYLEY B.—I am of the same opinion. The language of the proviso which takes this case out of the statute 9 G. 4. c. 14. is however, valuable for the purpose of elucidating the question before us. Section 1., after enacting that in actions on simple contracts, promises by words only shall not after the commencement of that act be deemed sufficient evidence of a new or continuing contract, contains the proviso, that nothing in the act contained shall alter, or take away, or lessen the effect of any payment of any principal or *interest* made by any person whatsoever. Here the payment of interest is made within six years; but it is true that the interest so paid became due more than six years ago. The fair effect of such a payment may be a fit question for the consideration of a jury, but this payment is an acknowledgement of interest paid on a debt remaining undischarged at that time. The debt in this case is on a promissory note. The defendant directs his tenant *Veysey* to make a particular payment of 6*l.* to the plaintiff, and afterwards allows that payment as part of the rent due from his tenant. Now if that payment had discharged not only the interest, but the principal, can it be supposed that the defendant would not have directed *Veysey* to get the note when he paid the money due, or that he would not, in common course, have himself applied for the note? It therefore seems to me that this payment being general, and accompanied by the circumstances of there being no requisition of the possession of the note, or any complaint that it was not given up, is an admission that at the time of the payment of interest in 1826, some principal remained due

on the note, and is therefore an acknowledgment sufficient to take the case out of the statute of limitations.

GARROW B. concurred, alluding to *Willis* v. *Newham.* (*a*)

BOLLAND B.—I agree that this verdict ought not to be disturbed, and that we must view the facts without any reference to the late act. In 1817, the plaintiff accommodated the defendant with a loan of money, for which this note was given, and interest appears to have been regularly paid on it down to 1820. The indorsement shews (*b*) that in 1826 a payment was made to the plaintiff on account of interest due in 1824, for the plaintiff applies it to the payment of interest, contradistinguishing it in effect from the principal due on the note. Now if the plaintiff had been a creditor who had pressed for payment of the principal, or if it had been paid by instalments, he would have applied the payment to the principal, and such payments would have been written off on the note. All the facts conduce to the presumption that the note was not paid, a presumption which is rendered conclusive by its remaining in the plaintiff's hands. In *Willis* v. *Newham* the payment of interest only was relied on as an acknowledgement to take the case out of the statute. I mention that case as an answer to the argument, that it is only a payment of principal which could be here relied on for that purpose.

Rule discharged.

(*a*) 3 Y. & J. 516.

(*b*) By 9 G. 4. c. 14. s. 3. no indorsement of payment *written* after the time appointed for that act to take effect [1st *Jan.* 1829] upon any bill or note *by or on behalf of the party to whom such payment shall be made*, shall be sufficient proof of payment, so as to take the case out of the statute of limitations.

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ALEXANDER and Others v. BARKER.

PERRY, Assignee of MARSHALL and Another, Sheriffs of LONDON, *against* WILLIAM and JAMES TURNER, and JOEL.

**A cognovit dated the 3d *Nov.* was signed by two of three defendants on the 4th, and by the third on the 7th. The plaintiff's demand was to be paid by weekly instalments, the first being payable on the 5th. The plaintiff had power to enter up judgment, and issue execution for the whole upon default in payment of any one instalment. The first instalment not being paid on the 5th, was paid on the 8th to the clerk to the plaintiff's attorney. Judgment had been signed on the 7th. After notice of the payment, plaintiff's attorney on the 8th gave notice of taxing costs for the 9th, but one of the defendants obtained a postponement. On the 10th, at ten o'clock, A. M. a notice of taxation of costs at two o'clock that day, was received at the defendant's house in London. The defendant's attorney went to the master's office at two, but ultimately failed to attend at three when the costs were taxed.**

ON 4th *November* 1831, *William* and *James Turner* signed a *cognovit*, dated the 3d, for a debt of 21*l.*; an instalment of 5*l.* became due on the following day, the 5th. The rest of the sum due to the plaintiff was to be paid at weekly instalments, on the 12th *Nov.* and other fixed days, and plaintiff had power to enter up judgment, and issue execution for the whole on any default. The instalment due on the 5th was not paid on that day. The defendant *Joel* did not sign the *cognovit* till the 7th; on that day the plaintiff's attorney signed judgment. On the 8th *November* at half-past nine in the morning, the defendant, *James Turner*, went to the chambers of the plaintiff's attorney, and paid a clerk there 5*l.* for the first instalment, due on the 5th, requested a receipt, and that the payment of the first instalment should

Held, that the judgment and execution against all three defendants were regular, and that the execution of the cognovit by one of them on the 7th, related back to the 3rd, the date of the cognovit. Also that the acceptance of the instalment by the clerk, did not waive the default of payment on the 5th, there being no proof of the clerk's authority to receive the money, or of any waiver by plaintiff's attorney when informed of the receipt. Also, that under the circumstances of the first postponement, a full day's notice of taxation was not necessary in order to tax the costs on the 10th.

*Semble*, the neglect to give one day's notice to tax costs, does not *ipso facto* avoid the judgment and execution for debt and costs, the rule of court being directory only.

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be indorsed on the back of the *cognovit*. The clerk said the *cognovit* was locked up by his master, so that it could not be indorsed. The plaintiff was informed by his attorney of the payment, but instructed his attorney to proceed. Two hours after, a notice of taxing the costs in the action was served on *James Turner*, for the next day, the 9th. On *Wednesday* the 9th, the defendant's attorney attended at the master's office, at three o'clock, *p. m.* waited half-an-hour, but neither the plaintiff's attorney nor his clerk appeared. It appeared on the affidavit of the plaintiff's attorney, that the taxation was put off till the 10th, at the request of one of the defendants. A letter from the clerk to the plaintiff's attorney, dated the 9th, addressed to *James Turner*'s house in *Cheapside*, arrived there by the second delivery of the two-penny post at ten in the forenoon of the 10th, and stated, that the plaintiff's attorney would attend to tax at the Exchequer office, at two o'clock (the 10th). The defendant's attorney attended at two, but finding that the Master was absent and did not attend till three, and that the plaintiff's attorney was not there, he went to the office of the plaintiff's attorney, and told his clerk it was not convenient for him to attend that day, but that he would attend a proper appointment. The clerk said the plaintiff's attorney was then gone to the Master's office, and in fact he had gone there and taxed the costs, in the absence of the defendant's attorney. On *Saturday* the 12th, when another instalment became due, the effects of *James Turner* and *Joel* were seized under a *fi. fa.* for the balance due on the *cognovit* and costs.

*Lloyd Hall* obtained a rule to set the judgment and execution for irregularity upon three grounds. 1st, The *cognovit* having been signed by *Joel*, after the day for paying the first instalment had passed, that default was absolutely waived as regarded him. 2d, That the taxation

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having taken place under insufficient notices, no regular allocatur had been made. And 3d, That execution could only issue for the instalment due.

*Aglionby* shewed cause.—By executing the joint *cognovit* on the 7th, *Joel* became equally liable as if he had signed it on the 3d, when it bears date, and was executed by the other defendants. The judgment is joint. Next, the notice of taxation for the 10th was sufficient, though delivered on that day, as the first notice for the 9th was the regular day's notice directed by *Reg. Gen., Trin.* 1831 (*a*), and that taxation was then postponed at the request of one of the defendants. The terms of the defeazance by which the plaintiff may sign judgment for the whole debt on one default, are an answer to the last point.

*Lloyd Hall* contrà.—As *Joel* did not sign the *cognovit* till after the default occurred, on which the judgment is founded, it cannot stand against him. In like manner, a deed only takes effect from the date of its actual execution. But if the judgment be regular for debt and costs, the execution is not; for the first notice of taxation was not served on the defendant's attorney, and if good was waived by the letter of plaintiff's attorney; and the second was not served one whole day before the time for taxing the costs. Then there is no regular allocatur, and if it was *de facto* completed by inserting the amount of the costs irregularly ascertained, still the judgment is not final, *Butler* v. *Bulkely* (*b*); *Blackburn* v. *Kymer* (*c*); and without final judgment the execution is bad. If the execution is regular, it should only have issued for the instalment due. *Charrington* v. *Laing* (*d*)

(*a*) See Vol. I. Appendix, xii. tit. Taxing Costs.
(*b*) 1 Bing. 233. (*c*) 1 Marsh. 278.
(*d*) 6 Bing. 242. and see *Davies* v. *Penton*, 6 B. & C. 216.

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shews that a *cognovit* stipulating for performance of various matters is only a security by way of penalty, which cannot be treated as liquidated damages. He also cited *Kemble* v. *Farren* (*a*), *Astley* v. *Weldon* (*b*).—[*Bayley* B.—In *Charrington* v. *Laing*, the judgment was held regular, but it was referred to the prothonotary to enquire what was actually due to the plaintiff.]

BAYLEY B. (*c*)—If any injustice has been done by an improper allowance of any costs in the absence of the defendant's attorney, the taxation may be reviewed at the plaintiff's expence. But independently of that question, I am of opinion that this judgment, and in strictness the execution, is regular. The objection to the judgment is, that when the instalment became due under the *cognovit* and was not paid, one of the defendants had not signed it, so that the *cognovit* was then in substance forfeited by the previous default in payment. But though *Joel* did not execute till *after* the 5th, still when he did execute, he executed with all the consequences ensuing on an execution of the instrument at a time prior to that when the instalment was made payable. The date of the *cognovit* shews, that it speaks of the 3d. On that day two of the parties executed it, and when *Joel* executed on the 7th, he agreed to and adopted the language of the *cognovit*, and it became the same thing as if it had been executed by him on the 3d. He might hope and expect that no execution would be issued against him for the instalment due on the 5th; but the plaintiff could not sign any judgment or issue any execution, except a joint judgment or execution.

I think, therefore, that *Joel*'s execution of the *cognovit* after the 5th, relates back to the time of the date, and that plaintiff was at liberty to insist on his right to sign

(*a*) 6 Bing. 141. (*b*) 2 B. & P. 346.

(*c*) Lord *Lyndhurst* was sitting in Equity.

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judgment on the 7th. However, in the morning of the 8th the instalment due on the 5th was in fact paid: and had it been accepted as a waiver of the default by a person having competent authority, that would be a final waiver; but the payment was merely to the attorney's clerk, and the attorney having locked up the *cognovit*, no indorsement could be made on it in his absence. On hearing of the payment from his clerk, he might adopt it as a waiver or not; but having been instructed by his client to proceed immediately, he forthwith gave notice of taxation, which was a notice that he intended to rely on the default, as if no such payment had been made.

Then has this taxation of costs taken place without a regular notice? On the 8th, a regular notice is given for taxing on the 9th, and had the costs been then taxed, there could have been no objection to the plaintiff's signing judgment and issuing execution. In the interim, however, one of the defendants applies to the plaintiff's attorney to put off the taxation. As all are bound by the taxation, he might be supposed to act for all. I am not clear that under the circumstances any additional notice of taxation was necessary, but I think that at all events after such an application by a defendant, the plaintiff's attorney was not bound to give him one whole day's notice, but to give him a fair and sufficient notice; and that if that were given, his proceedings would not be irregular. At all events, the attorney acting for the defendants, does in fact get a notice on the 10th, of taxation for that day at two o'clock. It is well known, that in practice, the Master does not attend till three, and the notice then was of two for three o'clock: the defendant's attorney goes at two o'clock to the Master's office, and finding neither that officer or the plaintiff's attorney there, goes to the office of the latter and says, "I have been at the Master's office and it is not

convenient to me to attend at three;" but he does not swear that it was inconvenient, or that he had any other engagement which prevented him from attending at that hour. The clerk of the plaintiff's attorney does not acquiesce in putting off the taxation, but says, his employer is gone with the papers to the Master's office, so that if the defendant's attorney had gone thither at that time, the costs might have been then taxed in his presence.

I cautiously avoid giving any opinion, whether the neglect to give notice of taxation of costs entitles the defendant's attorney to treat the judgment as irregular. The rule of the Court is directory, that before taxation of costs, one day's notice shall be given to the opposite party, but what the consequences of signing judgment without giving that notice shall be, is not clear upon the rule. It may be, perhaps, that the judgment would be supported or set aside at discretion of the Court under the particular circumstances of each case.

Neither judgment nor execution are shewn to be in this case irregular.

GARROW and BOLLAND Bs. concurred.

Rule discharged, but without costs, not having been moved with costs.

The Master to say whether any, and if any, what deduction should be made from the amount of the taxation, and which party should pay the costs of that taxation.

## HUGHES *against* MARSHALL and three Others.

Where the committee of a candidate at an election, opened a public house for voters in his interest, and some supporters of his subsequently gave orders there, on their own credit, for refreshments to be supplied as well to certain voters for him, as to others who had no votes: — Held, that the case did not come within the treating act 7 & 8 W. 3. c. 4. which provides against acts of treating done by the candidate or some person acting for him and on his behalf, viz. by his desire or with his privity, in order to be elected.

ASSUMPSIT for meat and drink, lodging and necessaries found for the defendants, and for several other persons at the request of the defendants. Plea, general issue.

At the trial at the last *Shropshire* summer assizes, before *Patteson* J., it appeared that, during the election in 1830, the defendants, who were friends of Mr. *Slaney* one of the candidates, had either in person, or by authority of written tickets supplied to them by his committee, given orders to the plaintiff, an innkeeper at *Shrewsbury*, to provide refreshments for upwards of 100 of Mr. *Slaney*'s voters, as well as for themselves and other persons who had not votes. Accordingly, during the election, which lasted five days, these refreshments were supplied to the above persons. After it ended, the plaintiff and defendants cast up the plaintiff's bill (*b*) incurred under the above orders. It amounted to 23*l*., and was admitted by the defendants to be right, and was made out to *Nicholls*, the chairman of Mr. *Slaney*'s committee, together with a bill of 30*l*. more on account of refreshments to Mr. *Slaney*'s voters. The 30*l*. was paid, but the 23*l*. was refused payment, as having been in-

Giving refreshments to voters in order to procure an election is an offence at common law as bribery, and the party supplying them cannot recover.

*Semble*, moderate and necessary refreshment may be furnished to voters coming from a distance. (*a*)

(*a*) But see per *Eyre*, C. J. *Ribbans* v. *Crickett*, 1 B. & P. 266. and per *Wood* B. *Lofhouse* v. *Wharton*, 1 Camp. 551. n.

(*b*) The bill was as follows:—"Friday *July* 30 1830. —— Inn, *Shrewsbury*. Eating, ale, &c. given to different burgesses, carriers, &c. *by orders of the undersigned*, amount of bill 23*l*."

Signed by the four defendants.

curred by defendants on their own account. It appeared, on cross-examination of the plaintiff's witnesses, that the plaintiff's house had, in the first instance, been opened for Mr. *Slaney*'s voters by his head committee. Neither of the defendants in this action were members of that committee.

The treating act 7 & 8 W. 3. c. 4. s. 1. being cited for the defence, the learned judge directed the jury, that unless the candidate himself gave the orders, or the defendants who did were proved to be his agents, the case would not come within the act, and defendants would be personally liable. He directed them to find a verdict for the plaintiff if they thought that the refreshments were furnished on the personal credit of the defendants. Verdict for plaintiff.

*Godson*, for defendants, obtained a rule for a new trial.

*Curwood* shewed cause.—The only question is on the construction of the Treating Act as applied to this evidence. Now as there is no evidence that the defendants were authorized agents of the candidate, while, on the contrary, the verdict shews that the articles were furnished on the personal credit of the defendants, it cannot be contended that the plaintiff is not entitled to recover, or that the case is within the letter or spirit of the act relied on. The plaintiff's house was not necessarily open for the purpose of treating; for voters arriving from distant places must seek reception and necessaries at inns; and unless it be now held that third persons, whose authority or connection with a candidate are only surmised, may not, on their own responsibility, supply such persons or any others with refreshments, the plaintiff will recover. *Ribbans* v.

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*Crickett and another* (*a*) was an action against candidates, and merely shews that for meat and drink furnished after the teste of the writ, at a candidate's request, no action lies. *Lofhouse* v. *Wharton* (*b*) is to the same effect.

*Godson* in support of the rule.—Treating is a species of bribery which is an offence at common law. *Rex* v. *Pitt and Mead* (*c*); and this contract is, therefore, void, being founded on bribery. That offence was complete by the plaintiff, whether the parties voted for the candidate, on whose behalf they were treated, or not, or whether he knew of the treating or not. *Sulston* v. *Norton* (*d*). In that case the bribery was by a friend of the candidate. 2ndly, The words of the treating act "by any other means on his or their behalf," shew that not only are acts of treating by the candidate himself, or his agents, within the act, but that similar acts by strangers without his authority, or that of his agents, are included in it. Here the candidate having by his committee opened the house for his voters in the first instance, no agency need be proved between him and the parties who step in afterwards and act on his behalf. [Lord *Lyndhurst* C. B.—The words "on his behalf" can only be taken to include acts done by his desire or with his privity; acts which he procures to be done by other means than his own. I apprehend it was not closely sifted how the witness knew that the house was opened by *Slaney*'s committee, and that it was assumed at the trial that he had spoken vaguely on that subject, or this verdict would not have been found.]

The payment of 30*l.* by the candidate's committee enforces the fact which appeared at the trial, that the

(*a*) 2 B. & P. 264. (*b*) 1 Camp. 550. (*c*) 3 Burr. 1335.
(*d*) 3 Burr. 1235. S. C. Bla. R. 317.

house was first opened by them. Then the candidate sets all in motion, and the acts of the defendants are ways and means to further his election, of which he cannot be taken to be ignorant. If more direct proofs of agency are required, the statute will be evaded. The plaintiff cannot recover in this action, if the act of supply, on which he grounds his claim, is prohibited by statute, *Langton* v. *Hughes* (*a*).

[*Bayley* B. — The words of the act shew that the act done must be in order to be elected, or for being elected. Now it does not appear whether the voters who received refreshments had polled before they so received them or not, and other parties not entitled to vote are shewn to have partaken. The argument would amount to this, that if a person resident in the election town kept his house open, and gave reasonable refreshment to out-voters coming from a distance, or to persons going about for the candidate, he would be guilty of a breach of the treating act.]

*Cur. adv. vult.*

On the next day Lord LYNDHURST C. B. delivered the judgment of the Court.

The rule for a new trial must be discharged. One question raised was, Whether this case was within the treating act 7 & 8 W. 3. c. 4.? and, upon the whole evidence given, we are of opinion that it was not; in which respect we agree with the learned judge who tried the cause. It is clear from the language of that statute, that no case falls within it, unless the candidate has some share in the transaction. Those words are "that no person or persons hereafter to be elected, &c.

(*a*) 1 M. & S. 593. see also *Law* v. *Hodgson*, 11 East, 300. *Bensley* v. *Bignold*, 5 B. & A. 336. *Cannon* v. *Bryce*, 3 B. & A. 179. *Little* v. *Pool*, 8 B. & C. 192.

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after the teste, &c. shall or do hereafter by himself or themselves, or by any other ways or means on his or their behalf, or at his or their charge before his or their election, &c. directly or indirectly give, present or allow to any person or persons having voice or vote in such election, any money, meat, entertainment or provision, &c. in order to be elected, or for being elected," &c. It is quite clear, from these words, that the act must be done by the candidate himself, or by some person or persons acting for him and on his behalf. But there is no evidence here to affect the candidate; indeed, the question was put to the jury, to whom was credit given for these articles? and they found that they were supplied on the defendant's credit. We, therefore, are of opinion that the treating act does not apply to this state of facts.

But another point has been urged, that it is not very material whether the refreshments were provided by the candidate or not, so as to fall within the enactments of the statute above alluded to, for that the furnishing them at all with a view to further or affect the election would be an offence at common law, so that no person concerned in it could recover. Now if such acts are made out and proved to have taken place for the purpose of procuring an election, that constitutes the offence of bribery at common law, and the above position would be true. But the facts here proved do not appear to us sufficiently clear to establish such a case. First, there is no evidence to shew that the parties to whom these articles of food were furnished had not voted before they received them, nor does it appear whether they lived in the town, or came from a distance which might make it reasonable or requisite that they should have moderate refreshment at some place or other. We are of opinion that no case has been made out sufficiently strong to make the conduct of the de-

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fendants illegal; and if it is not, there is nothing to prevent the plaintiff from recovering, even if he had been shewn to be conusant of every particular of that conduct. Nor should it be omitted that the amount charged for refreshments to this number of persons during five days is very inconsiderable.

There is nothing, therefore, to shew that what was done amounted to bribery committed in order to influence the election; if it had, the act of *William* would have applied. Besides, a large part of the bill having been expended by the defendants themselves, and by their orders, on carriers and other persons who had nothing to do with the election, that part must have been paid for by the defendants. Thus there would be a verdict against them for so much at least, if we should send this case down to a new trial for a jury to inquire whether any of the articles charged for were furnished for the use of, or to influence the election. But on the whole, we are of opinion that no case is made out shewing the conduct of the defendants to be illegal; and if it is not, the plaintiff must recover.

Rule discharged.

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## POOLE *v.* SALTER.

*ALEXANDER* moved for leave to sign judgment notwithstanding a plea of judgment recovered. He said that the declaration was of *Trinity* term, but

A plea of judgment recovered will not be set aside on affidavit of its falsehood, on the ground that the plaintiff had not sufficient time to get judgment in the term; when it appears that he might have taken the regular steps earlier in the term so as to have obtained such judgment. (*a*)

(*a*) See Tidd, 564. 9th Ed.

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that the plaintiff had delayed his proceedings on account of offers of composition made by the defendant's attorney, whose plea would now delay the plaintiff till next (*Hilary*) term, if the rule was not granted. He produced affidavits of the falsehood of the plea.

But *per curiam*, as the plea was delivered in time for the plaintiff to obtain his judgment in this term; he should have taken the regular steps to have done so at an earlier part of it, and there is no instance of granting this motion where such steps have not been taken.

Rule refused.

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DYKES ALEXANDER and three Others *against* BARKER.

Defendant applied for a loan of money to *D. A.* who was a partner with several others in a banking house. Nothing passed at the time of negociating for the loan to exclude the firm from making it. The advance was afterwards made out of the partnership funds. Held, that the other partners were properly joined with *D. A.* in suing for money lent.

*ASSUMPSIT* for 200*l.* for money lent and paid by the defendant to the use of the plaintiff, and for interest.

At the trial, before *Garrow* B. at the last Summer assizes for *Suffolk*, it appeared that the plaintiffs were bankers at *Ipswich*, and sued to recover money advanced for the defendant, to pay his instalments due on ten shares of 100*l.* each, held by him in the *Ipswich* Steam Navigation Company, formed in 1825. The plaintiff *Dykes A.* was the treasurer, and he and his partners were the bankers of the company. The sums received and paid by them, as such, were kept by them in three separate books, waste-book, ledger, and cash-book, in

Submission to the opinion of a judge declared by him at the trial to be for a nonsuit, does not estop a motion for a new trial if his opinion be incorrect.

The rejection of evidence which if admitted would not alter the case or establish any fact not already proved by other means, is not a ground for a new trial.

addition to which was a pass-book, *viz.* a copy of the ledger, (*a*) which passed between them, in which the party to whom it was passed recognized its entries as to receipts and payments of money. *Dykes A.* subscribed for ten shares, the other defendants for five shares each. Previous to the 24th *May* 1825, the defendant had paid two calls of 10 per cent. each on his ten shares, and on that day applied to *Cubit*, the company's secretary and engineer, to know if *Dykes A.* would object to pay the future instalments on them, on receiving a transfer of them as his security, charging interest at the rate of 5*l.* per cent. The shares were then at a premium. *Cubit* communicated with *Dykes A.* as to advancing the money to defendant, and swore that he consented to it. Some answer was returned, in consequence of which, when the next call of 10 per cent. was made, the defendant wrote to the plaintiff *Dykes A.* as follows :—

"*London*, 25th *July*, 1825.

"Sir—I was informed some time ago by my friend Mr. *Cubit*, that you were kind enough to say you had no objection to pay the future calls for me on ten shares which I hold in the *Ipswich* Steam Navigation Company, on my paying you interest at 5 per cent. per annum, and lodging my shares, with 20 per cent. paid thereon, as your security, which I shall be very happy to do; and shall feel obliged by your paying the present and any future call or calls which may be made on the said ten shares, and I will transfer or convey them to you as security in any way you may prefer.

(Signed) *Samuel Barker.*"

(*a*) The entries were as follows :—

"Cash in account with the company.

"*Samuel Barker* 100*l.* on account of 3d instalment to the steam company.

(Same) on account of 4th instalment to the steam company 100*l.*"

Thus debiting the defendant and crediting the company, *i. e.* virtually an advance to the company.

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The above was sent inclosed in the following letter to the secretary, *Cubit*:—

"I have received your notice of a further call on the *Ipswich* Steam Navigation Company's shares, and I avail myself of the offer of Mr. *Alexander* to pay my proportion, charging me interest thereon at the rate of 5*l.* per cent. per annum. Will you therefore oblige me by stating in what way I am to convey my shares to him, as his security," &c.

*Cubit* replied by letter that he would answer the inquiries about the transfer after having seen Mr. *Alexander*.

The plaintiffs proved by their clerk, *Revans*, that in *September* and *October* 1825, credit was given by them to the company for 200*l.*, and the defendant was debited in a like sum, for two further calls on his shares; and that the Steam Company had drawn out that amount. They contended that this was not a payment by *Dykes A.* alone, but by the firm of *Alexander* and Co. out of their own money.

The plaintiffs then proposed to produce the pass-book used between them as bankers and the steam company, to shew that that 200*l.* had been included in a gross sum paid by them to the company, and appropriated by the plaintiffs to the defendant accordingly; but the book not being proved to have been ever seen by the defendant, or its contents communicated to him, and he not being shewn to have ever been at the plaintiffs' banking house, or to have had any access to it at the company's office, the Learned Baron rejected it, and being of opinion that the action should have been brought by *Dykes A.* alone, and that a personal transaction between *Dykes A.* and the defendant did not lay the foundation of any action against him by the firm, nonsuited the plaintiffs.

*Storks* Serjt. obtained a rule for setting aside the

nonsuit, and having a new trial. The nonsuit took place in consequence of the rejection of the pass-book. That book being kept by *Dykes A.* (the party requested to advance the money) with the steam company to whom the money was advanced, was evidence; being an entry of transactions between the plaintiffs and the company, of which the defendant was a member. It was called for as the best evidence of the defendant's knowledge of the payment of 200*l.* by all the plaintiffs to the steam company on his account, as a member of it, and was then objected to as *res inter alios acta.* Supposing it established that the advance was by the firm, though the request for it was to *Dykes A.* only, an action by him alone could not be supported. *Garrett* v. *Handley* (*a*); *Cothay* v. *Fennell.* (*b*) Besides, the evidence, independently of the pass-book, was sufficient to entitle the plaintiffs to recover.

*B. Andrews* and *Austin* shewed cause.—First, the pass-book was properly rejected. It was tendered in evidence to affect the defendant as a partner in the steam company, but the plaintiffs, in their character of partners in the *Ipswich* bank, had no concern with the company at large, or its members. The entries offered were merely matters in a pass-book used between the plaintiffs, as bankers, and *Dykes A.*, as *treasurer* of the company, and passing accordingly from time to time from the former to the committee of management of the latter.

[Lord *Lyndhurst* C. B.—The use proposed to be made of the pass-book was nothing more than to prove the payment, by the firm of *Alexander* and Co., of the third and fourth instalments. But the book, if admitted in evidence, would have carried the plaintiffs' case no further against the defendant, as a member of the Steam

(*a*) 3 B. & C. 462. and 4 ibid. 664. (*b*) 10 B. & C. 671.

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Company, than the *viva voce* evidence, which proves both instalments to have been paid by the plaintiffs to the Company.

The entries in the book were clearly evidence against the Company, and every member of it, that they had received 200*l.* on account of the defendant; and if so, they were also evidence to prove the single fact of payment of that sum to them by *Alexander* and Co.]

The application for the loan having been made to *Dykes A.*, who personally consented to make it, the question is, Whether he alone or his partners, the plaintiffs with him, advanced the money at his, the defendant's request? But as the mere fact of an advance to the company is all which the book, if admitted, would have shewn, and had been sufficiently proved before, the book could have had no effect on the verdict, and the court will not interfere. *Horford* v. *Wilson.* (*a*)

The plaintiffs' counsel having acquiesced in the nonsuit at the trial, cannot now urge that it was mistaken, when that acquiescence prevented the defendants from producing evidence to contradict their case. *Kindred* v. *Bagg*, (*b*) *Butler* v. *Durant*, (*c*) *Robinson* v. *Cook*, (*d*) *Elsworthy* v. *Bird*. (*e*)

[*Bayley* B.—Lord *Tenterden*'s constant holding has been, that if at a trial a judge express a distinct opinion that the plaintiff ought to be nonsuited, and the defendant's counsel submits to that opinion, the Court will set aside the nonsuit, if the opinion so expressed and submitted to accordingly, turns out to be wrong. Were it otherwise, the counsel would have to decide at the moment, and at his client's peril, whether the holding of the judge were right or wrong.] (*f*)

(*a*) 1 Taunt. 12. 14. but there the jury had given a verdict.
(*b*) 1 Taunt. 10. (*c*) 3 Taunt. 229.
(*d*) 6 Taunt. 336. (*e*) M'Clel. 69.
(*f*) And see *Harris* v. *Butterley*, Cowp. 483. *Pochin* v. *Pawley*, Bla. R. 670. *Ward* v. *Mason*, 9 Pri. 291.

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On the evidence admitted the defendant was entitled to a verdict, and the nonsuit is right. (*a*) If the firm lend the money, it must still be shewn that the advance was so made with the defendant's knowledge or concurrence; but it does not appear that he could possibly know, or be expected to know, that the advance was in fact made by them. The defendant, a stranger to *Ipswich*, held shares in the Steam Company, and knowing *Dykes A.* as treasurer of that body, deals with him individually for a loan, to be secured by handing over to him the shares as securities. There is not in this case that connecting link between the party applied to and his partners which existed in *Handley* v. *Garratt*. (*b*) Besides, that case turns not on the plaintiffs being co-partners, and as such entitled to bring the action; but on the finding of the Court from the correspondence, that the guarantee was intended to enure for the benefit of the *firm*. Had they found the converse, *viz.* that it was given for the benefit of an individual partner, they might have decided otherwise.

*Storks* Serjt. and *Kelly contrà*, were stopped by the Court.

Lord LYNDHURST C. B.—If this question had turned only on the rejection of the pass-book in evidence, I should have been of opinion that that rejection would not have formed sufficient ground for granting a new trial, because the fact which would have been established by its admission had been sufficiently proved by the other evidence. But on the general question, I am clearly of opinion that the plaintiffs ought not to have been nonsuited. I consider the general rule to be, that

(*a*) See *Edmondson* v. *Machell*, 2 T. R. 4. *Edwards* v. *Evans*, 3 East, 451.

(*b*) 4 B. & C. 664.

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when an application for a loan is made to a banker, a member of a firm, and the money he lends is that of the firm, the action may be brought by all the partners jointly interested.

As to the argument, that the learned judge was not applied to to let the case go to the jury, cases have been cited in which the Courts have refused to set aside nonsuits, when the counsel acquiesced at the trial, and did not insist on the case going to the jury. But as in those cases the Courts above coincided in opinion with the judge at *Nisi Prius*, the principle on which they turn is not applicable where, as in this case, the opinion expressed by the learned judge at the trial is held by the Court to be incorrect. If a counsel assents to a nonsuit on hearing from a learned judge that if the case goes to the jury he shall direct them in a manner which the Court above afterwards thinks incorrect, we are bound to consider the case as if it had gone to a jury with that direction, and a verdict had been found accordingly; and in such a case the Court may interfere and grant a new trial.

BAYLEY B.—I agree that a new trial ought to be had in this case, not on the ground of the pass-book having been rejected at the trial, because it appears to me irrelevant to the question between the parties. For the entry would have only shewn that a certain sum had been advanced by the plaintiffs to the Steam Navigation Company, but would not have proved that that sum included the sum lent to the defendant, or elucidated the question whether that sum had been lent by *Dykes A.*, and not by the firm generally.

My opinion, then, does not rest on the rejection of the book, but on the testimony of *Revans*, the clerk to the plaintiffs, coupled with the letters of the defendant to *Cubit* and the plaintiff *Dykes A.* From that evidence, it

seems to me that the plaintiff was entitled to recover in this action upon the main point. I am the less surprised at the opinion expressed by the learned judge at the trial, that *Dykes Alexander* was the person with whom the defendant contracted, and could alone maintain the action; for I know that for a considerable time it remained the impression of Lord *Ellenborough*, that where money was lent by a partner, an action must in all instances be brought in the name of the individual with whom the contract was made, and not generally by the firm; but he afterwards changed his opinion on this subject, and adopted what is doubtless the true rule, that the action may be brought either by the individual with whom, or in whose name the contract was made, or by the parties for whose benefit it was made. (*a*) I am clearly of opinion that all the plaintiffs may sue in this action, and am supported in that position by *Garrett* v. *Handley*. *Dykes Alexander* stood in a double capacity, being an individual proprietor of the Company, and a member of the banking firm. The defendant wanted an advance of money, and it was quite immaterial to him whether it was made by the individual to whom he applied, or by the house in which he was a partner. When he applied to *Dykes Alexander* to make an advance, he did not qualify his request by saying, "You may be a member of some firm, but if you make an advance to me, it must be made by you individually, and I will not be responsible to any other:" but he applied generally to *Dykes A.* for an advance, without any qualification. Now it appears to me, that by so doing he entitled *Dykes Alexander* to hold him responsible for the advance made in either of the characters of an individual, or a member of the banking firm, in which he, *Dykes Alexander*, should choose to adopt the application. Now it ap-

(*a*) See 1 Chitty on Pleading, 4th Ed. 4.

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peared from the testimony of *Revans*, that *Dykes Alexander* made the advance, not out of his own money, but from that of the firm. He therefore entertained the application as partner in the firm, and rendered them the principal lenders.

In *Garrett v. Handley*, the contracting partner first brought the action in his own name, but it turned out that the advance was made by the house of which he was a partner, and not by him; and the Court said—"You did not make the advance, and cannot alone maintain the action." Another action in the name of the firm was held maintainable, the Court being of opinion that the guarantee was intended to apply to advances made by the firm. The words of that guarantee were much more pointed than this letter, being addressed to an individual thus: "I understand from Mr. G. that you have had the goodness to advance 550*l.* on my assurance, which I hereby give, that provision shall be made for repaying you this sum," &c. The advance, however, was not made by the individual alone, but by the firm, and they were held the proper persons to sue.

Therefore, under the circumstances of this case, it appears to me that the present plaintiffs, as composing the firm, were the persons who might and ought to sue; and upon the ground that the learned judge was prepared on this occasion to have given a direction to the jury which would have produced a wrong result, I am of opinion that there ought to be a new trial, and that the counsel who did not desire the case to be left to the jury, but submitted to the nonsuit out of proper respect to the learned judge, is not precluded from afterwards moving for a new trial.

GARROW B.—My opinion at the trial turned on the impression I had long entertained, that a man cannot change the creditor without the debtor's consent. I

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thought that if *Dykes A.* had answered the defendants' application for a loan by saying, "I cannot lend this myself, but the firm may," the defendant would thereby had an opportunity of rejecting a responsibility not restrained to *Dykes A.* alone, but extended to the other partners. I regret that the plaintiff's counsel did not call on me to leave the case to the jury, and concur that there must be a new trial.

BOLLAND B.—I am of the same opinion, not on the ground of the rejection of the pass-book, which carries the case no further than *Reuss's* evidence did, but on the authority of *Garrett v. Handley*. Where one party applies to another for a loan, without inquiring whether the money is to be advanced by the lender as an individual, or as a member of a firm, he is liable to either the individual or the firm, as the advance may chance to be made. At the same time, he might so guard his dealings as to make himself merely a debtor to the lender.

Rule absolute.

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EJECTMENT for lands in *Cheshire*. The defendants defended jointly for the whole, and entered into a joint consent rule confessing possession on February 1831, according to Reg. Gen. Hil. 4 Geo. 4 (a) for a new trial

Where an *elegit* creditor brings ejectment against a debtor whose *primâ facie* title to the whole property sought to be recovered is proved, it is incumbent on other parties in possession as under-tenants, or otherwise, to show their better title, (*e. g.* by tenancy anterior to the judgment or the like) or the *elegit* creditor must recover.

(a) Vol. 1. Appendix, p. [illegible]

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Doe d. EVANS and Another v. OWEN and Others.

At the trial before *Bosanquet* J. at the last summer assizes for *Cardiganshire*, the lessors of the plaintiff, claiming as tenants by *elegit*, proved a judgment dated 24th *August* 1830, in an action against the defendant *Owen* in the great sessions of that county, by an examined copy from the custody of the prothonotary in pursuance of 11 G. 4. and 1 W. 4. c. 70. As the judgment roll did not contain the award of *elegit*, &c. (*a*) final process having issued after the abolition of the *Welsh* courts, they produced examined copies of the *elegit* issued out of this court since that event, with the inquisition and sheriff's return. They also proved a lease dated 1793, by which it appeared that at the time of the judgment the defendant *Owen* was tenant for life of the whole property. The three other defendants were his under-tenants in possession before the date of the inquisition, but for what term, and subject to what power of determining the possession by *Owen*, did not appear. For the three defendants not parties to the judgment against *Owen*, it was objected by *E. Vaughan Williams*, that the lessors of the plaintiff, as his creditors, could only take by *elegit* such interest as he had in the land; and that as they had not shewn the nature of the other defendants holding, or that *Owen* was entitled to determine their possession, they were entitled to a verdict. The learned Judge directed a verdict for the lessors of the plaintiff, with leave to move to enter a verdict for the above mentioned three defendants.

A rule *nisi* having been accordingly obtained on the above point (*b*)—

(*a*) See *Ramsbottom* v. *Buckhurst*, 2 M. & S. 565.

(*b*) *Williams* also moved on another point made at the trial, *viz.* that the judgment against *Owen* being signed in the Great Sessions before their abolition, and the *elegit* having since issued out of this court, it was for the

Where final process issued from the Court of Exchequer on a judgment signed in a *Welsh* court of Great Sessions before its abolition, but did not recite the removal of the judgment into the Exchequer. Held, that the *elegit* and judgment were not inconsistent for the purpose of evidence, though the irregularity might have been the subject of a motion.

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*Russell* Serjt. *Wilson*, and *Lloyd Hall* shewed cause.—The question is, whether any of the defendants have any interest which the judgment will not affect. By the consent rule the defendants are admitted to have been in possession of the whole premises when the ejectment was served; and those of them who are not parties to the judgment against *Owen*, the defendant, seek to infer from that fact that they were so in possession in virtue of a tenancy existing in *August* 1830, prior to, and therefore not affected by the judgment. But it was their duty to prove such a tenancy before *August* 1830, it being a fact peculiarly within their knowledge, and they have not done so. However, that point is not material, for the lessors of the plaintiff made out a *primâ facie* case by having proved a lease of all the premises to *Owen*.

*E. Vaughan Williams* in support of the rule.—Though the lessors of the plaintiff were bound to prove the judgment and *elegit*, yet the three defendants who were not parties to either cannot be turned out of possession by that evidence of a debt from *Owen*. The inquisition and *elegit* have no other effect than as a lease and release of a moiety of the lands, which would only be evidence against parties and privies. Though

lessors of the plaintiff to shew themselves at liberty to proceed on the judgment by producing a certificate thereof filed with the deputy clerk of the pleas, according to *Reg. Gen. Mich.* 1 W. 4. [Vol. I. Appendix, p. iv.] The *elegit* put in in evidence recited the act 1 W. 4. c. 70. but was silent as to the removal of the Welsh judgment into this court, so that it was inconsistent with the judgment proved, and did not appear to be founded on any regular judgment of this court.

But *per Cur.* if the *elegit* issued without the judgment having been brought hither, the proper course would have been to have moved to set it aside for irregularity, for otherwise the acts of courts possessing competent jurisdiction *rite acta esse præsumuntur*.

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the modern coupon rule supersedes the necessity of oral proof of the defendant's possession at the trial; that possession is no less a part of the case of the lessor of the plaintiff than before. Then that possession must be presumed lawful, and it was for the lessors of plaintiff to disprove that the defendants were in by a tenancy which the *elegit* debtor could not get rid of by shewing that they had possession after the judgment.

Suppose the action had been brought against the debtor by *elegit* only, a paramount title must have been shewn, not only in the creditor, but in the debtor, in order to turn out the tenants in possession. Again, had the ejectment been against the tenants in possession alone, evidence must have been given that they came into possession subsequently to the judgment. Then can the joinder of *Owen* as a defendant, make them liable to be dispossessed, on evidence only applicable against him? It might in every ejectment be said that the defendant is bound to allege and prove his title on the ground of his peculiar knowledge of it; yet the rule is that the lessor of the plaintiff must recover on the strength of his own case.

Lord Lyndhurst, C. B.—In ejectment the lessor of the plaintiff shews an early title, and there rests his case. The onus then lies on the defendant to shew a legal title inconsistent with it, or a subsequent alteration in the first title which renders it consistent with his right to a verdict. Here the title of *Owen* under the lease embraces the whole of the property. The mere admission of the fact of the defendant's possession at the time of bringing the ejectment does not prove his right to that possession, and will not give him title, provided a *primâ facie* case be made out against him. His bare possession may be that of a wrongdoer, and as he contends for an inference of right from it, he must bear the

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burden of proof. Here the lessors of the plaintiff rely on a lease which they prove, vesting the property in *Owen*, and the presumption is in favour of the continuance of his title under that lease. Then if the defendants rely on any thing inconsistent with it, as that they were lawfully in possession at the time of the judgment, it is incumbent on them to shew it.

The title of *Owen* covers the whole property comprised in the lease. Therefore the consent rule appears to me to establish no more than the mere fact that the defendants were in possession at the time of bringing the ejectment. Then it is incumbent on the defendants to shew that they derived title from *Owen* before the judgment.

BAYLEY, B.—I entirely agree that in order to recover in ejectment on an *elegit*, a good title must be shewn against all the defendants. Here by a lease of 1793, *Owen* is entitled to possession of the whole property claimed, and the judgment binds it from *August* 1830. But as *Owen* is the *elegit* debtor, the lessors of the plaintiff have made out a good title to the possession, except as to persons claiming under *Owen*, by a title paramount, viz. by title previous to *August* 1830. However, as three other persons were in possession besides *Owen* at the time of bringing the ejectment, it became necessary to bring ejectment against them in order to recover the property then in *Owen's* possession. They know their own title, viz. when they came into possession; and it was for them to shew that notwithstanding the *elegit*, they had a right to the possession. I have always found it to be a rule on pleading that the party in whose knowledge a fact peculiarly lies, must make averment of it on the record, and sustain the burden of it in proof. Thus had the lease and *elegit* been set out in pleading by the creditors to support their claim

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under *Owen*, the other defendants must have answered that *primâ facie* title by alleging that *Owen* made them his tenants at a day past previous to the judgment. *Owen* has the whole property under the lease, and the defendants know whether their possession is under him or adverse to him. That fact is not in the knowledge of the *elegit* creditors. If the defendants came in under *Owen*, they know that they came in by means of his title, and whether their tenancy commenced before or after *August* 1830; but if they give no evidence at all that it accrued before that date, then after the lessors of the plaintiff have established that the title to the possession of the whole was in the *elegit* debtor at any one period, the burden of proof of their title is cast on the defendants.

Garrow B. concurred.

Bolland B.—I am of the same opinion. The question is, Whether the onus of proof lies on the lessors of the plaintiff or on the defendants? The consent rule merely admits the defendants to be in possession at the time of bringing the ejectment. Here the *elegit* creditors come in on the same title as their debtor *Owen*, viz. the lease for life, and if he had brought an ejectment against these three defendants, they might have relied on a tenancy to him which they must have shewn, or they would be mere wrong doers. The lease to *Owen* having been put in, these defendants were put to shew that their title overrode the judgment of *August* 1830.

Rule discharged.

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CANHAM *against* FISK.

Water flowing over a close *primâ facie* passes with it by conveyance of the land; and uninterrupted appropriation of such water for less than 20 years, gains a title to it so as to sustain an action for its diversion.
If costs are directed to abide the event, neither party has the costs of the first trial, if the event of the second is different from that of the first.

CASE for stopping up and diverting a water course, which arose at a spring in a close above the plaintiff's garden, and in its course through it was used by the plaintiff.

At the trial before *Garrow* B. at the last *Suffolk* assizes, the plaintiff proved that till 1811, the close called *Broomhill*, in which the water rose, and the plaintiff's garden contiguous to it through which it flowed towards the *Orwell*, were the property and in the possession of one person. About that time the plaintiff a market gardener bought the latter close, and tempted by the stream, made it a garden, using the water for household and garden purposes, till in 1830 its course was obstructed by defendant, who had afterwards bought *Broomhill* and conducted the greater part of the water round it to supply houses newly built below the garden. For the plaintiff title by long user was urged; for the defendant no witnesses were called, and he relied on the fact elicited on the examination in chief, that before plaintiff's possession in 1811, *Broomhill* and the plaintiff's garden were in one possession, and that the title to the water by presumed prescription was destroyed by the unity of possession of the land. The plaintiff was nonsuited.

*Kelly* moved for a new trial. — The plaintiff's title by appropriation and enjoyment of the water since 1811, was sufficient to maintain his action. *Williams* v. *Morland* (*a*). — [*Bayley* B. An unity of possession merely

(*a*) 2 B. & C. 910. and see the converse, where a right to lights had been disused, *Moore* v. *Rawson*, 3 B. & C. 332. See also 2 Saund. 114. 6 Pri. 1.

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suspends a prescriptive easement, there must be a unity of ownership to destroy it (*a*).—] A rule being granted,

*B. Andrews* and *Brendergast* shewed cause.—As both closes were in the same ownership and possession till 1811, there is no ground to presume a grant, or for the prescriptive right to the water on which the plaintiff relied.—[*Bayley* B. Suppose the owner of two fields sells one, having a stream of water flowing through it, can the vendee stop that water course? *prima facie*, no exception in the conveyance would be presumed.—] No conveyance was produced in support of the plaintiff. A title to a watercourse can only exist in three ways: 1st, prescription: 2d, actual grant: 3d, presumption of grant. Now as to the first, the unity of ownership defeats it; secondly, no grant was shewn; and lastly, a lost grant could not be presumed before the lapse of twenty years.—[*Bayley* B. There is a fourth mode of acquiring a title to a water course, viz. appropriation or occupancy of water which a man finds in his own land unappropriated by another. *Bealey* v. *Shaw* (*b*).—Lord *Lyndhurst*. The plaintiff has had possession since 1811 of the land over which this water flowed. That possession imports a fee in the plaintiff, which could only pass by grant. That grant, though silent as to the water which flowed over the land, would pass it, though the reverse may be the case where the water running over another man's land is granted (*c*). Then, because the conveyance of the garden is not produced, can we presume it to have contained an exception of the water?—] The only point made for plaintiff at the trial was prescriptive, viz. immemorial user, to which the answer was,

(*a*) See Co. Lit. 313. a. Comyns's Digest, tits. Extinguishment; Suspension.

(*b*) 6 East, 208. (*c*) Co. Lit. 4. a.

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CANNAN v. FIAT

unity of possession before 1811, which came out on examination in chief.

Lord *Lyndhurst*. That did not prevent the plaintiff from taking the other point now, which, after closing his case, he might not be able to do at the trial; viz. that the water passed to him by grant of the land, over which it was accustomed to flow. Here the grant of the land conveyed the easements existing on it at the time.

*Bayley* B. If I have a house surrounded by my land and sell the house, I sell the right to light from the windows. The sale of the house as it stands, gives a right to the light coming in at the windows, without necessity for twenty years possession of the easement.

The Court made the rule absolute, directing the costs to abide the event; on which it was suggested, that by the practice of this court *upon that order*, the plaintiff, who had failed before would receive the costs of the first as well as second trials, if he succeeded on the second trial.

No costs of first trial, where the costs are ordered to abide the event, and the party who fails on the first trial succeeds on the second.

But per Lord *Lyndhurst*. That is not the rule of this Court; for here, as in the King's Bench, where the costs of the first trial are ordered to abide the event of the second, neither party will be entitled to costs of the first trial if the event of the second differs from that of the first (a).

(a) Dax's Practice, 149. acc. Tidd's Pr. 915. 9th edit. So where the court makes no order that the costs shall abide the event. Ibid. The motion in *Pooley* v. *Millard*, Vol. I. 260. was made *pro majori cautelâ*, at a time when the Exchequer practice was doubted.

## ANONYMOUS.

Practice on statement by bail that he has money at a place named.

ON opposition to bail, by *Chilton*, one stated that he had a sum of money at a particular place.

BAYLEY B.—The bail may justify conditionally, if on inquiring at the places where he swears he has money, the affirmative of that fact should be ascertained.

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## FENTON, *against* WARRE.

Notice of bail need not state the bail to have resided for the last six months at the places of residence mentioned in the notice.

BAYLEY B. held that the notice of bail need not state that the bail have been resident for the last six months at the places of their residence mentioned in the notice, according to *Reg. Gen. Trin.* 1 W. 4. 1831, (Vol. I. 520.) saying that that fact must be assumed till the contrary is shewn by affidavit.

*Price* for, *John Jervis* against the bail.

A similar decision took place in *Topham* v. *Calvert*, on 14th *Nov.* 1831.

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## DOE *against* ROE.

Affidavit of service in ejectment must not qualify the possession of the tenants in possession by stating service on them as *executors*.

*WIGHTMAN* moved for judgment against the casual ejector, on an affidavit of service on the tenants in possession *as administrators*.

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BAYLEY B.—How can they be tenants in possession *as administrators*? Service on the tenants in possession is required, but here a qualification is introduced; and on an indictment for perjury, it might be said that one was in possession, and that his possession was that of both. The affidavit must be amended.

The words *as administrators* having been afterwards struck out—

Rule granted.

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## HITCHCOCK *against* BADHAM.

A *venire* issued against a husband who was abroad for goods supplied to his wife in her separate trade was served at her house, and on the return a *distringas* issued according to the practice of the Exchequer, to levy 40s. The levy was made on goods in the wife's house. The court set aside the service of the *venire*, and the *distringas* with costs.

STEER had obtained a rule to shew cause why the service of the *venire* and *distringas* should not be set aside for irregularity, and the issues levied thereon be returned.

In *March* 1830, the defendant's wife, who carried on trade as a milliner, without the intervention of her husband, incurred this debt for goods supplied in her business. In *September* 1830, defendant went to *Van Dieman's Land*, where he was shewn to be in *May* 1831, and was not shewn to have returned since. The *venire* had been issued against him and served on the wife, by leaving a copy there; and on its return a *distringas* had issued to levy 40s. according to the practice before 7 & 8 G. 4. c. 71. and levy was made on goods found at the wife's house, which were stated by defendant to belong neither to her or her husband.

*Follett* shewed for cause, that the wife's goods in her

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separate business might be taken to compel appearance to process for a debt incurred by her in that business.

*Per Curiam.*—The plaintiff has no doubt that she is a married woman, and sues the husband accordingly as liable for the supplies to the wife. Then, though he is absent from the country, and knows nothing of the process, you take goods in possession of the wife to compel his appearance.

Rule absolute with costs, on terms of bringing no action.

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WHITEHEAD *against* MYNN.

Bail allowed to be changed on excuse offered, and on undertaking to pay costs incurred by putting in insufficient bail and putting plaintiff in same situation as if good bail had been put in at first.

ALEXANDER moved, under *Reg. Gen. Trin.* 1 W. 4. (Vol. I. Appendix, p. vi.) for a rule to shew cause why plaintiff should not be allowed to substitute two other bail (naming them) in lieu of the two bail already put in, who had not justified, and were not able to justify. The excuse offered for putting in bad bail was, that the agent had not time to communicate with the country attorney.

BAYLEY B.—The rule was made after much consideration. Its object was to secure good bail in the first instance. However, as this is the first application, and is made under peculiar circumstances, just after the rule has begun to operate, a rule may be granted on undertaking to pay the costs incurred by putting in insufficient bail, and putting the plaintiff in the same situation as if good bail had been put in at first.

The rule was afterwards made absolute, no cause shewn.

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## REEVES *against* HUCKER.

Affidavit to hold to bail for rent due, money paid, &c. is bad if it does not allege the money to have been paid, &c. "at defendant's request," but an application to discharge a defendant on account of this defect is too late after bail above put in.

ON 5th *November Alexander* moved that an *exoneretur* might be entered on the bail-piece, and the bail-bond given up to be cancelled, and the defendant discharged out of custody on entering a common appearance, and why plaintiff should not pay the defendant's costs and the costs of this application, and why proceedings should not be stayed in the mean time. The affidavit to hold to bail was for rent due to the deponent by the defendant, and for money paid and expended by the deponent for the defendant, without adding "*at his request.*" He stated that in K. B. the mistake was held fatal, *Pitt v. New* (*a*); in C. P. not. (*b*)

BAYLEY B.—The judges were of opinion at a meeting in this term, that the King's Bench practice was the correct one.

Rule granted without costs.

In consequence of two days' notice of motion for stay of proceedings not having been given (*c*), the rule was not drawn up, and defendant was obliged to put in bail above, who rendered him to the *Fleet*.

*Alexander* renewed his former motion.

*Per Curiam* (BAYLEY, GARROW, and BOLLAND, Bs.) —*Dargent v. Vivant* (*d*) and many other cases show that this application is too late after bail above put in.

(*a*) 8 B. & C. 654.

(*b*) 5 Taunt. 704. 756. 1 Marsh. 315. 6 Taunt. 389. 2 Marsh. 82. 1 Bing. 338.

(*c*) Dax's Practice, 137.

(*d*) 1 East, 330. and see id. 81. 1 B. & P. 132. 7 T. R. 375. 1 M. & S. 230. 6 Taunt. 185. *Shawman v. Whalley.*

## GIBSON and Another *against* WHITE.

Bail put in may after exception, and on the day for justification, move for time to render defendant, without justifying on the ground that he is in custody under warrant of commissioners of bankrupt.

ON 16th *November*, *Comyn* moved that the bail should have time till the 21st to render the defendant, and to stay proceedings in the mean time. Bail were put in on the 7th, excepted to on the 10th; on the 12th the defendant became bankrupt, and was committed to *Newgate* by warrant of commissioners of bankrupt, but was to be brought before them on the 21st. The rule was drawn up for the 18th.

On the 19th *Butt* shewed cause, that the plaintiff having committed no irregularity, the rule could not be supported till the bail were in Court by having justified.

But *per Curiam*.—Justification is unnecessary, nor is it the object of the bail, who assign the special ground for time to render, that the defendant is as it were in criminal custody.

Rule absolute, defendant to be rendered on the 21st.

See Tidd, 9th Edit. 282.

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## PAINE *against* MUNTON.

The plaintiff's costs of inquiries after sufficiency of bail are costs in the cause.

*HUTCHINSON*, for plaintiff, applied for costs of inquiries after the sufficiency of the bail, who had filed an affidavit according to *Reg. Gen. Trin.* 1 W. 4.(*a*)

(*a*) Vol. I. Appendix, vii.

*Ball* moved that they might be made costs in the cause; to which

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BAYLEY B. (the only judge in Court) after consideration, acceded: saying, the plaintiff would have to pay them if no order should be made.

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## EDWARDS *against* BROXON.

TRESPASS for breaking and entering two closes called *Coppice* field and *Elm-barn* meadow. Pleas general issue and right of way over those closes.

At the trial at the *Summer* assizes for *Shropshire* before *Patteson* J., a right of way was proved by defendant over the *Coppice* field; but it was shewn that about fifty years ago, instead of going from that field directly into *Elm-barn* meadow, as pleaded, the way passed first into another close, and then into *Elm-barn* meadow. On this variance the plaintiff had a verdict for nominal damages, having proved that the defendant had gone over the two closes. *Jervis* moved for a new trial on affidavit of surprise and payment of costs, in order to amend the pleadings on this slip in the description.

A plea of right of way described the line of way incorrectly, and plaintiff had a verdict. The court refused a rule for a new trial in order to enable defendant to amend, though moved on payment of costs, and on affidavit of surprise.

*Per Curiam.*—We know no instance where a new trial has been applied for, the verdict being clearly right and the pleadings wrong. The defendant used the way described in the plan, but if he had pleaded it as it of right existed, the plaintiff might have newly assigned *extra viam*.

Rule refused

## Bowser and Others *against* Austen.

The residence of the defendant must be stated in the affidavit for a *distringas*.

CHILTON moved for a *distringas*. The affidavit was silent as to the place of the defendant's residence, at which he was attempted to be served.

Bayley B.—That should be stated, for he may have resided in one street and removed to another. The affidavit should state where the dwelling-house of the defendant was, at which the personal service was attempted.

Motion refused.

See Dax's Practice, 27. and next case.

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## Fisher *against* Goodwin.

STEER moved for a *distringas*. Only two calls to serve the defendant were stated.

Bayley B. — Except under extraordinary circumstances, it is considered requisite that there should be at least three attempts to serve the defendant with the *venire*. The affidavit should state where the residence of the defendant is, and the answers given to the enquiries there made. From such materials the Court will judge, whether the defendant is in the neighbourhood and keeps out of the way to avoid personal service. Nothing appears here to shew that he was at home, or that he was

not somewhere in the place, but that the servant who answered did not know where.

Motion refused.

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FISHER v. GOODWIN.

*Hobbyn* v. *Simpson.*

22d *Nov.*

The defendant being shewn to have been at home on two out of three occasions when the deponent called at his dwelling-house in —— street, to serve the defendant with the *venire*. A *distringas* was granted. *C. Cooper* moved.

Distringas. Defendant at home.

*Latchman* v. *Cross.*

24th *Nov.*

*Saunders* moved for a *distringas* on an affidavit that three calls had been made at the defendant's dwelling-house in —— in order to serve him with the *venire*. That on the second occasion the deponent fixed a time with defendant's wife for calling again, and called again at that time. On asking for defendant, his wife said, "He is in the shop, I'll fetch him." She came back directly and said he was gone.—*Bayley* B. granted the writ.

*Distringas.* Facts shewing avoiding service of *venire*.

*Anonymous.*

Same day.

A similar motion was granted to *Saunders* where there had been three calls at defendant's house, but it was merely sworn that on the first two occasions the deponent had "made appointments" to call again.—*Bayley* B. held that expression too vague, without stating the answers obtained. However, it being also sworn that the plaintiff's clerk had seen the defendant in the neighbourhood just before defendant wrote a letter to the plaintiff expressing a wish not to see him,—the writ was granted.

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HALTON *against* STOCKING.

*Nov.* 8.

RULE to set aside an attachment for irregularity.

It appeared that after the rule obtained and the irregularity discovered, an offer was made to set aside the attachment at the party's own expence, and pay costs

If after rule obtained to set aside proceedings for irregularity, the other party offer to waive proceedings and pay costs of the rule *nisi*, costs subsequent to the offer must fall on the side which does not accept it.

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of the rule *nisi*. It was notwithstanding proceeded in.

The Court made the rule absolute. The defendant to pay costs up to the time of offer made, and the plaintiff's attorney to pay costs subsequently incurred (*a*).

*Thesiger* for, and *Steer* against the rule.

(*a*) See *Beeston* v. *Beckett*, ante p. 112.

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MARTIN *against* GELL.

12th *Nov.*

Justifying bail who had made affidavit under *Reg. Gen.* T. 1 W. 4, but omitted to state they were housekeepers.

*FISH* moved to justify bail, who had sworn the affidavit pointed out by *Reg. Gen., Trin.* 1 W. 4. (*b*), but had omitted to state in it that they were housekeepers.

The application not being opposed, GARROW B. suffered them to justify in the usual manner, saying, that it was unnecessary that the Court should interpose if the plaintiff did not.

(*b*) Vol. I. Appendix, vii.

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WILSON *against* MINCHIN.

19th *Nov.*

It is not too late to move for security for costs after order for time to plead granted, but before plea.

ON the 9th, *Follett* obtained a rule for staying proceedings till security for costs given, an order for fourteen days time to plead having been made on the 8th.

*Platt* shewed that fact for cause, citing *Duncan* v. *Stint* (*c*). The defendant had there pleaded, but the

(*c*) 5 B. & A. 702.

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WILSON v. MINCHIN.

order for time to plead puts the defendant in the same situation as if he had actually pleaded. It is not here sworn that at the time the order for time was obtained, the defendant was not acquainted with the plaintiff's absence from this country.

*Per Curiam.* — A defendant may move for security of costs at any time before plea pleaded. The application should be as early as possible, to avoid needless expense.

Rule absolute, the costs to be costs in the cause. (*a*)

(*a*) In another case (*Anonymous*) which followed the above on the same day, a similar rule was discharged on its being shewn that one of the two plaintiffs resided in this country. *Bayley* B. observing, that the defendant had the security of one plaintiff, and that he recollected no instance of such a motion being granted.

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YOUNG, Gent. *against* HARRIS.

Where an action is brought for less than 20*l.* and no leave to move or misdirection have occurred, the court will not grant a new trial, though the verdict was for the defendant.

*ASSUMPSIT* for an attorney's bill of 9*l.* 19*s.* The defendant pleaded a set-off, and at the *Middlesex* Sittings after *Trinity* term obtained a verdict.

*Andrews* Serjt. now moved for a new trial on affidavits of matter not known at the trial, contending *in limine* that the rule against granting a new trial where the sum in dispute is under 20*l.* (except on leave given at the trial, or for misdirection) only applied where a verdict had passed for the plaintiff.

*Per Curiam.* — Where the sum in dispute is so small, and the party would be bound to pay the costs of the application, the Court think it for his advantage not to grant a new trial.

Rule refused.

## REGULA GENERALIS.

### Michaelmas Term, 2 William IV.

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IT IS ORDERED, that from and after the last day of this present term, the Exchequer Office of pleas be kept open as follows: that is to say, during term, and one week after every term, from eleven o'clock in the morning untill three o'clock in the evening; and at other times from eleven o'clock in the morning till four o'clock in the afternoon; the usual holidays excepted, when the said office is to be closed.

## COALTSWORTH *against* MARTIN.

*HUMFREY* shewed for cause against a rule obtained by *Platt*, for judgment as in case of nonsuit, that the plaintiff had not been ruled to enter the issue under an order of court dated 28 *May* 1742, directing that where issue is joined the plaintiff shall enter the issue on record when *required* by defendant.

Before *Reg. H.* 2 W. 4. *Reg.* I. § 58, four days' notice of motion for judgment as in case of nonsuit must have been given in Exchequer, but there was no rule to enter the issue as in the King's Bench.

BAYLEY B.—In this court the defendant must give four days' notice of motion for judgment as in case of a nonsuit (*a*), but there is no rule calling on the plaintiff to enter the issue, as in the King's Bench (*b*).

(*a*) Dax, 76. *Doe d. Clark* v. *Clark*, 7 *Nov.* 1831, MSS. *Secus* in K. B. Lofft, 265. Tidd's Forms, 284, 5, 5th edit.; but such notice is not now necessary in any of the Courts since *R. H.* 1 W. 4. *reg.* I. 58, unless intended to operate as a stay of proceedings.

(*b*) In K. B. the defendant, before moving for judgment as in case of a nonsuit, ruled the plaintiff to enter the issue on record. After the issue was entered, judgment as in case of nonsuit might be moved for at any time, even in a country cause, though defendant had had no opportunity of trying by proviso. Per *Parke* J. (after consulting the Master), *Tapley* v. *Wainwright*, 28 *Jan.* 1832. *Tyrwhitt* for defendant. *Addison* contrà, cited Tidd, 9th ed. 760. And see now *R. H.* 2 W. 4. *Reg.* I. 70.

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## RUTLEDGE *against* GILES.

IN *Trinity* term 1831, judgment was signed for debt and costs on 9th *June*, and levy was made in *London* on *Friday* the 10th or *Saturday* the 11th at latest, but without delivering a copy of the bill of costs or giving a day's notice before taxing it, must be complained of promptly. Where ten days intervened between the seizure of the goods and the striking of a docket against the defendant without any step to set aside the execution, it was held that an application for that purpose after that time (the defendant's bankruptcy having intervened) was too late, and that the irregularity, if any, was waived.

Irregularity in an execution in signing judgment and seizing goods,

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no copy of the bill of costs and affidavit of increase had been previously delivered to the attorney for the defendant, nor was a day's notice given before the costs were taxed, pursuant to *Reg. Mich.* 1 W. 4. *R.* II. § 10, (*ante* Vol. I. p. 161.) The 13th *June* was the last day of term. On the 21st a docket was struck against defendant. On the 22d a commission of bankrupt issued against him, and on the 24th he was adjudged a bankrupt. On 5th *July* assignees were chosen, and on the 6th a summons to set aside the proceedings was taken out before a baron. It was heard at chambers on the 8th, and adjourned with stay of proceedings till the fourth day of *Michaelmas* term.

*Platt* had obtained a rule to set aside the proceedings for irregularity in not complying with the above rule.

*Erle* shewed cause. The defendant's delay to move has cured any irregularity. A party must come as early as possible to set aside proceedings for that cause; for by lying by he puts the other party in a worse situation than if the complaint had been made at an early period. Ten days here elapsed between the levy and the docket struck; so that had the objection been made with promptitude, the plaintiff might have obtained the produce of his judgment by retaxing his costs before the bankruptcy.

*Platt* contrà. From the plaintiff's non-compliance with the rule of court the execution is irregular (*a*), and the defendant *could* not know that judgment was signed till the levy on the 11th. Only one day remained in term, and judges at chambers can only stay, and not set aside, proceedings (*b*). The summons was taken out

(*a*) *Quære.* See *ante* 112. (*b*) See next case.

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on the day after the assignees were chosen, and this motion was made within the time then fixed for so doing by the judge.

[*Bayley* B. That time was so fixed because the state of things could not then be varied.]

LORD LYNDHURST C. B.—In order to take advantage of an irregularity, those who complain of it must come promptly. Had an application been made at chambers at an early opportunity after the levy, the plaintiff might have abandoned the execution, and after paying the costs of it might have retaxed his costs and issued a new execution for debt and costs before the bankruptcy. During the delay which has taken place a bankruptcy has intervened, and the plaintiff would be much prejudiced if this execution was set aside.

BAYLEY B.—Had the defendant made a prompt application to a judge in the first instance to stay the proceedings, it would have operated as a notice to the plaintiff, who might have taken steps to remedy the irregularity in his execution, and might have secured his debt and costs before the commission issued.

Rule discharged with costs,
having been so moved.

## SPICER and Another *against* TODD.

A judge at chambers cannot make an order to set aside proceedings in an action, nor can he give costs on the summons.
An assignee of an insolvent debtor, who was a cestui que trust, sued in the names of the trustees without their consent, but after having offered them an indemnity, and the court stayed the proceedings till they were indemnified to the satisfaction of the master.
A judge's order may be rescinded without making it a rule of court.

A Cestui que trust being entitled to certain rents and profits for life was discharged under an insolvent act. His assignee now sued for rent in the names of the trustees, having first tendered them indemnity for costs. The defendant applied to a baron to stay the proceedings, on affidavits that the action was brought in the trustees' names without their authority. The baron made the order, and directed the costs to be paid by the plaintiff's attorney. The order was not made a rule of court.

*Archbold* now moved to rescind that order. A cestui que trust may sue in the names of his trustees (*a*), and the assignee here stands in the place of the cestui que trust; *Chambers* v. *Donaldson* (*b*). The assignee could sue in the trustees' names, their only course being to move the court to stay proceedings till they should receive indemnity for costs.

[Lord *Lyndhurst* C. B. A mere tender of indemnity is not sufficient. The application should be to the court that the master may decide on its sufficiency.] A rule having been granted,

*Platt* for the trustees, shewed cause. First, the order not having been made a rule of court, the motion to rescind it cannot be entertained; *Hawes* v. *Johnson* (*c*).

But *per Curiam*. A Judge's order exists, and if you may move to make it a rule of court you may move to rescind it.

(*a*) *Semble*, accordingly *Doe d. Nepean* v. *Budden*, 4 B. & Ald. 626. Sic per Lord *Eldon*, ex relat. *Burrough* J. *Hickey* v. *Burt*, 7 Taunt. 49.
(*b*) 9 East, 471. (*c*) 1 Y. & J. 12.

He then urged on the merits that both plaintiffs were averse to the action, and ought not to be put in peril of being taken in execution for the costs. He abandoned that part of the order which directed payment of costs (*a*). Secondly, a judge at chambers has only power to stay proceedings in an action, in order to give plaintiffs an opportunity of applying to the court to set them aside (*b*), and cannot give costs.

*Archbold.*—In ejectment the constant practice is to use the names of persons in whom the legal estate is vested—a course which equally exposes them to the risk of paying costs. If the trustees names cannot be used, the assignee must resort to equity to compel them to become parties to the action. He again mentioned *Chambers* v. *Donaldson.*

Lord LYNDHURST C. B.—That was an action for breaking and entering the house of the wife while living apart from her husband under sentence of an ecclesiastical court. It was brought in the husband's name, that being the only course by which, under her peculiar circumstances, she could protect herself from personal injury, her husband having colluded with the defendants to protect their wrong. This order to set aside proceedings should not have been made at chambers. But what right had the assignee to bring this action in the name of the trustees? He should have shown not only that an indemnity was offered them before *action* brought, but that they assented to its sufficiency, as it might have been rejected in the first instance on account of its being worthless.

(*a*) See *Read* v. *Lee*, 2 B. & Adol. 415. costs of summonses at judge's chambers are not allowed by K. B.

(*b*) Tidd, 9 ed. 511.

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The rule was made absolute to set aside the order on the terms of staying all the proceedings till the plaintiffs were indemnified to the satisfaction of the Master.

See *Mountstephen* v. *Brooke*, 1 Chitty's Rep. 390, acc. If the name of a plaintiff, not being a trustee, has been used without his consent, he may apply to the court to secure his indemnity against costs, or may release the action; *Hickey* v. *Burt*, 7 Taunt. 48; and see *Chambers* v. *Donaldson*; and the party applying to set aside such release, though only given by one of several co-trustees or co-executors, being co-plaintiffs, must make out a very strong case of fraud on his affidavits; *Jones* v. *Herbert*, 7 Taunt. 421; *Barker and another* v. *Richardson*, 1 Y. & J. 362; and such a release must prevail at nisi prius, as the judge has no equitable jurisdiction, and can only look to the legal rights of the parties. *Alner* v. *George*, 1 Camp. 392.

A consent by the plaintiff to the using his name will prevent him from releasing the action, *Hickey* v. *Burt*; nor can a trustee release an action commenced in his name without leave of the court, per Lord *Eldon*, ex relat. *Burrough* J. ibid.

As to a donee's suing in an executor's name for a *donatio mortis causâ*, see *Gardner* v. *Parker*, 3 Madd. Ch. R. 184.

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## HODGKINSON *against* WALLEY.

A plaintiff cannot act upon two concurrent writs of *ca. sa.* and *fi. fa.* at the same time. Thus when a *fi. fa.* and *ca. sa.* having issued together, a small sum only was obtained on levy under the former, and was swallowed up in the landlord's rent and expenses of execution, and before returning the *fi. fa.* the defendant was taken in execution under the *ca. sa.*; he was discharged out of custody.

A *Ca. sa.* and *fi. fa.* had issued against the defendant returnable at the same time. Levy was made under the *fi. fa.*, but the proceeds were paid to the landlord for rent, except 17*s.* 6*d.*, which was retained towards the expenses of the execution. Before the *fi. fa.* was returned the defendant was taken on the *ca. sa.*

*R. V. Richards* obtained a rule to discharge the defendant, on the ground that the *ca. sa.* could not be

executed before the *fi. fa.* was on the file of returned writs, and cited *Miller* v. *Parnell* (*a*).

*Follett* shewed cause. The *fieri facias* not having been effectually executed need not be returned. *Miller* v. *Parnell* admits that both processes may issue at the same time, though only one may be executed (*b*).

BAYLEY B.—There is no doubt that a *fi. fa.* and *ca. sa.* may issue together and be concurrent, for if nothing is done on either, no award of execution is entered on the roll. But if one is executed, a return of that must be entered before you can so enter the award of another execution. Now if both are executed concurrently, the entry on the roll must be that both were awarded and issued on the same day, which would be irregular. The *capias ad satisfaciendum* should have recited the return to the writ of *fi. fa.*, and what levy had taken place under that writ. It might then have gone for the residue. It is clear upon principle that two executions cannot be acted upon at the same time. Here two issue, and a seizure of goods takes place, which if made the subject of an action of trespass could only be justified under the *fi. fa.* Here, before any return to the writ of *fi. fa.*, the defendant's person is taken under the *ca. sa.*

The other Barons concurred.

(*a*) 6 Taunt. 370. 2 Marsh. 78. *S. C.* cited *Edmond* v. *Ross*, 9 Pri. 5.

(*b*) Com. Dig. Execution H. cites cases contrà. Another point arose respecting the *cognovit* on which the judgment and execution were founded having been signed by the defendant in custody, in absence of any attorney for him. It appeared that by the practice of the Exchequer and K. B. no attorney need be present. But see now *Reg. H.* 2 W. 4. *Reg.* I. § 72. post.

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HODGKINSON v. WALLEY.

*Per Curiam.*—Rule absolute with costs, in case of defendant undertaking to bring an action; without costs, if he should not.

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SCOTT *against* MARSHALL.

In Exchequer a rule for costs of the day makes itself absolute unless cause be shewn on or before a certain day, and cause cannot be shewn after that day.

A Rule *nisi* for costs of the day for not proceeding to trial, was drawn up for 8th *November*. Cause was attempted to be shewn on 14th. But, *per Curiam*, this being a rule *unless* cause shewn, became absolute on the 8th, no cause having been shewn before or on that day.

*Burchell* for, *Watson* against, the rule (*a*).

(*a*) See Dax's Practice, 76. The distinction in Exchequer is between a rule nisi, which makes itself absolute on a certain day, *unless* cause be shewn, (as above) and a rule to shew cause on a certain day, in which case, the day after that mentioned in the rule is the day for shewing cause.

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Ex parte TOMLINS, Town Clerk of *Richmond*, in *Yorkshire*.

Where the amount of estreats to be certified by clerks of the peace, town clerks, &c. to this Court is under 5*l*., they may verify the return or certificate by affidavit without commission or personal appearance.

THE Court permitted this gentleman to verify his return of estreats, &c. to this Court, required by 3 G. 4. c. 46. § 14. by affidavit without a commission or personally appearing, the amount being under 5*l*., and directed a similar course for the future where the estreats, &c. did not amount to that sum (*b*).

*Starkie* moved.

(*b*) See 2 Y. & J. 142, *Ex parte Hodgson*.

## LISLE *against* CHETWODE.

1831.

Affidavits in support of an application to set aside proceedings on a bail bond may be intitled either in the original action or in that against the bail.

*SAUNDERS* applied at the instance of the bail to set aside proceedings on a bail bond, on an affidavit which was originally intitled as in an action against the bail, i. e. *Lisle* v. *Wilson* and another, and having been rejected by the officer, had been afterwards amended by intitling it as above against the original defendant.

BAYLEY B.—The affidavit may be intitled either way (*a*).

Rule granted.

(*a*) *Kelly* v. *Wrother*, Hil. 1816, 2 Chit. R. 109 acc. Before which case it was held in 4 T. R. 689, 8 ed. 456, that if a bail bond is irregularly assigned, or being regular, is sought to be set aside on terms, the affidavit and rule should be intitled in the original cause; but if the bail bond is regularly assigned, and the motion is to set aside the proceedings for some irregularity in the process in the action on the bail bond, the affidavit &c. should be entitled in the action against the bail. Tidd. 9 ed. 304.

# CASES

DECIDED

IN

## HILARY TERM, 1832.

IN THE

## COURT OF EXCHEQUER OF PLEAS,

AND IN ERROR IN THE

## EXCHEQUER CHAMBER,

IN THE

SECOND YEAR OF THE REIGN OF WILLIAM IV.

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### DOE on the demise of ANN MEYRICK *against* MARY MEYRICK.

1832.

[In the Exchequer of Pleas.]

General words in a deed following particular words specifically describing and enumerating a certain house and closes are controlled and limited thereby.

EJECTMENT for lands in *Anglesea*. At the trial before *Bolland B.* at the Summer Assizes for *Anglesea*, in 1831, the claim of lessor of the plaintiff

In 1816, *William M.* a tenant in tail, suffered a recovery and stated in the deed to make a tenant to the præcipe his intention to cut off the entail of the capital mansion house, tenement, lands &c. *thereinafter particularly mentioned.* He then described the property conveyed as " all those the capital mansion house, messuage or tenement, with the several out offices, gardens, plantations and hereditaments thereunto belonging, commonly called or known by the name of *Cefn Coch*, situate &c. and also eight fields (stating their names) " *parts and parcels of the demesne lands of Cefn Coch*, together with all and singular houses, lands &c. &c., hereditaments and appurtenances whatsoever to the said capital messuage, tenement, lands, hereditaments and premises appertaining &c. or therewith set, let &c." The *Cefn Coch* estate consisted of the mansion house with the above eight fields, and also of five other fields, contain-

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was narrowed down to five fields said to be demesnes of *Cefn Coch*. The lessor of the plaintiff was sister of the Rev. *William Meyrick*, who died 14th *October*, 1829, without issue, seised as tenant in tail of the mansion of *Cefn Coch*, with the lands annexed to it, under a recovery suffered by *Thomas Meyrick*, senior, in *August*, 1739, of " all that capital messuage and tenement called *Cefn Coch and all* the *demesne lands*, meadows, pastures, and appurtenances whatsoever to the same capital messuage belonging or appertaining, or therewith usually held or enjoyed, then or late in the occupation &c. And all that water grist mill with the appurtenances called *Melin y Cefn Coch*, and the lands thereunto belonging, or therewith usually held and enjoyed, and then or late in the occupation &c. And all that fulling mill, called *Pandin' Cefn Coch*, all which said several messuages, mills, tenements, lands and premises were situate &c. in the parish of *Llanfechell* in the county of *Anglesea*." The uses were to the settlor *Thomas Meyrick*, senior, for life, with remainders in tail in succession to *William Meyrick* his first, and to *Thomas* his second son, and to his daughter the lessor of the plaintiff.

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ing about thirty-four acres, the property in dispute, as well as of a corn grist mill, called in a previous settlement of 1739, " *Melin y Cefn Coch*, with the lands thereto belonging," and a fulling mill. *Melin y Cefn Coch* was surrounded on three sides by the five fields in question, but the lands originally thereto belonging were only eleven acres. The whole *Cefn Coch* estate was cultivated by *Thomas M.* as tenant to *William M.* for many years before and after 1816, and new purchases of contiguous land made from time to time by *William M.* were also cultivated by *Thomas M.*

In 1824, *Thomas M.* suffered a recovery of premises described in the recovery deed as " all that water corn mill with the appurtenances called *Melin y Cefn Coch* and the lands &c. belonging thereto, called or known by the name of *Tyddyn y Felin Cefn Coch*" (i. e. the house of the mill of *Cefn Coch*) and of the fulling mill and " all those five fields, closes or parcels of land or ground part of *Tyddyn*, &c. aforesaid, situate &c. containing by estimation thirty-four acres or thereabout." In 1819 at the death of *William M.*, *Thomas M.* entered the rest of the premises, except the mansion house of *Cefn Coch* and the eight fields:—Held, that notwithstanding the general words in the deed of 1816, only the mansion house of *Cefn Coch* and the eight fields particularly described passed by that deed, and that the other five fields part of *Tyddyn y Felin Cefn Coch* passed by the deed of 1824.

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*Thomas Meyrick*, senior, died in 1763, and *William Meyrick* entered as tenant in tail. In 1816 he suffered a recovery, and in the deed to make a tenant to the præcipe stated his intention thereby to cut off the entail of and in the capital messuage, tenement, lands, hereditaments and premises with the several out offices thereinafter (viz. in the deed) particularly mentioned, and settled on the lessor of the plaintiff thus; "All those the capital mansion house, messuage or tenement, with the several out offices, gardens, plantations and hereditaments thereunto belonging, commonly called or known by the name of *Cefn Coch*, situate in the parish of *Llanfechell*, in the county of *Anglesea, and also all those several fields*, closes, pieces or parcels of land or ground and hereditaments, being eight in number, commonly called or known by the several names of (the names of eight fields were here enumerated) *being parts and parcels of the demesne lands of Cefn Coch* aforesaid, all situate in the parish of *Llanfechell* aforesaid, and in the holding or occupation of *Thomas Meyrick* (second brother of *William Meyrick*) his under tenants or assigns, together with all and singular houses, outhouses, edifices, buildings, barns, stables, yards, gardens, orchards, lands, meadows, leasowes, pastures, ways, wastes, waters, watercourses, hedges, ditches, walls, mounds, banks, fences, timber and other trees, woods and underwoods, commons, paths, passages, easements, privileges, profits, commodities, emoluments, advantages, rights, members, hereditaments and appurtenances whatsoever to the said capital messuage, tenement, lands, hereditaments and premises belonging or in any wise appertaining, or therewith, or with any part or parcel thereof usually set, let, held, occupied or enjoyed, or accepted, reputed, taken for or known as part, parcel or member thereof, or appurtenant thereunto, or to any part or parcel

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thereof," to such uses as *William Meyrick* might by deed or will appoint, and in default of such appointment to him for life, remainder to the use of *Ann* (lessor of plaintiff) sister of the said *William Meyrick* for life, remainder to the use of the right heirs of *William Meyrick* for ever.

*William Meyrick* also died seised of lands called *Cefn Gwyn*, purchased by him and lying intermixed with the estate of *Cefn Coch*, and devised them to the lessor of the plaintiff for life. In 1824 a recovery was suffered by *Thomas Meyrick* to his own use in fee. The recovery deed recited the settlement of 1739, and, reciting that he was desirous of suffering a recovery so far as related to the hereditaments and premises thereinafter described, for the purpose of docking all estates tail of and in the premises thereinafter mentioned, conveyed to trustees in trust for his wife, the defendant in fee, all that water corn grist mill with the appurtenances called *Melin y Cefn Coch*, and the lands thereunto belonging, and therewith usually held and occupied, and formerly in the holding of &c.; and then better known by the description of " all those the messuage, tenement, lands and hereditaments called or known by the name of *Tyddyn y Felin Cefn Coch*, together with the water and wind corn grist mills, hereditaments and premises thereto belonging, situate in the parish of *Llanfechell* in the county of *Anglesea*, and all that fulling mill with the appurtenances commonly called by the name of *Pandi Cefn Coch* &c., and *also all those five fields, closes, pieces, or parcels* of land or ground, part of *Tyddyn y Felin Cefn Coch* aforesaid, situate in the parish of *Llanfechell* aforesaid, and containing by estimation 34 acres or thereabouts. The following general words were subjoined, " and all other the lands, tenements and hereditaments situate in the several parishes of (among others) *Llanfechell* parish

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in the county of *Anglesea*, in which the said *Thomas Meyrick* had any estate or interest in tail at law or in equity, and every part and parcel of the same with their and every of their appurtenances, and the reversion, and all the estate, right, title and interest of the said *Thomas Meyrick*.

After *William Meyrick's* death in 1819, *Thomas Meyrick* entered as tenant in tail under the settlement of 1739, and was possessed of all the property except the mansion house and eight fields conveyed by the deed of 1816. In January 1831, he died, having devised to his widow and executrix, the defendant, the property contained in the recovery of 1824. The plans produced shewed that the land originally belonging to *Melin y Cefn Coch* was about eleven acres, and that five fields containing about thirty-four acres surrounded that mill on three sides. For many years before 1816, and from that time to *William Meyrick's* death *William Meyrick* and *Thomas Meyrick* lived together in the mansion of *Cefn Coch*, *Thomas Meyrick* alone occupying the whole thirteen fields, of which the estate of *Cefn Coch* consisted, as well as the lands &c. described in the settlement of 1739, and also lands after acquired by *William Meyrick* and adjoining to the settled property. Some of the fences between the two descriptions of lands being from time to time thrown down, the old and newly acquired property became intermixed.

At the trial it was contended for the lessor of the plaintiff, that the demesne lands of *Cefn Coch*, comprising as well the five fields mentioned in the recovery of 1824 as the eight fields mentioned in that of 1816, passed by the general words of the recovery deed of 1816; and that if that recovery did not convey the whole of the *Cefn Coch* estate, that of 1824 did not, and consequently that the lessor of plaintiff was tenant

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in tail of the five fields, under the recovery deed of 1739.

For the defendant it was answered, that the recovery of 1816 embraced nothing beyond *Cefn Coch* house, &c., with the eight fields described by name in that recovery as *part* of the demesne lands; that description shewed that the rest of the fields, viz. the five named in the recovery deed of 1824, were not intended to pass by the recovery of 1816, and that the operation of its general words over the lands not intended to be conveyed was thereby excluded. *Moore* v. *Magrath* (*a*); *Cholmondeley* v. *Clinton* (*b*); *Thomas* v. *Davis* (*c*).

The acreage of the five fields claimed by defendant was shewn by her to correspond with that stated in the deed of 1824, but they were not further identified as part of the demesne lands of *Cefn Coch*. For the defendant it was also proposed to prove by the attorney who drew the recovery deed of 1816, that the testator only meant to give his sister the fields immediately round the house of *Cefn Coch;* and *Doe* d. *Bulkley* v. *Wilford* (*d*) was cited; but the learned Baron rejected the evidence, and having expressed his opinion that the five fields passed under the recovery deed of 1824, the jury gave a general verdict for the defendant. A rule for a new trial, or to enter a verdict for plaintiff, *non obstante veredicto*, having been obtained,

*Follett* and *Welsby* now shewed cause.—The house, with the eight fields particularly mentioned in the recovery deed of 1816, were all which passed under it, and the general words in the deed of 1816 can only refer to the property particularly described. *Moore* v. *Magrath* (*a*). Though the recovery deed of 1824 does not specify the five fields by name, yet as their acreage

(*a*) Cowp. 9.
(*b*) 2 J. & W. 91.
(*c*) 1 Dickens' Ch. C. 301.
(*d*) Ry. & M. 88.

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and parish corresponds with it, it was for the lessor of the plaintiff to rebut that *primâ facie* evidence of identity. If not, the general words in that deed are comprehensive enough to carry all *Thomas Meyrick* had in tail in the respective parishes. *Doe* d. *Pell* v. *Jeyes* (*a*); *Attorney General* v. *Vigor* (*b*); and *Church* v. *Mundy* (*c*).

*R. V. Richards*, *J. Jervis* and *Lloyd* in support of the rule.—The question on the deed of 1816 is, Whether under the words of the deed all the property of *Cefn Coch* passed, or the particular parcels only? The court will not look beyond the deed itself, except to see how far the lands had been occupied together, and will take it most strongly against the grantor. The general words passed all which was part of the same holding with the house, thus including the five fields claimed by the defendant. The question being, what had been usually considered the *Cefn Coch* property? that, on the evidence, appeared to be thirteen fields. In *Doe* v. *Williams* (*d*) the question was, Whether under the general expressions of "lands," leaseholds held with freehold lands would pass, as abundant freeholds existed to satisfy those words; but the court there distinguished cases arising on wills from those arising on deeds in this, that whilst a deed is to be construed most strongly against the grantor, both parties to a will are entitled to the same favour.

[*Bayley* B.—Possession had in that case gone along with the deed.]

The thirteen fields were in the same occupation as *Cefn Coch* farm in 1816, and for many years after. Now the general words in the recovery deed of 1816 are qualified, while those in the deed of 1824 are not; so that it is necessary to discover the state of the property

(*a*) 1 B. & Adol. 593.
(*b*) 8 Vesey, 256, on a *will*.
(*c*) 15 Vesey, 406.
(*d*) 1 H. Bla. 25.

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to which the words in the deed of 1739, "therewith usually held" apply. Only eleven acres belonged originally to *Melin y Cefn Coch*.

[Lord *Lyndhurst*.—The deed of 1739 does not shew what *Cefn Coch* or *Melin y Cefn Coch* at that time consisted of. But in 1816 these five fields might have been so long occupied with *Melin y Cefn Coch* as to be then considered part of it. In *Doe* v. *Williams* the conveyance was of the messuage, mill and lands called *Clock Mills*, and the lands, &c. "to the said messuage or mill belonging, or used, occupied and enjoyed, or deemed, taken *or accepted as part thereof*;" and leaseholds occupied with, and reputed part of the *Clock Mill* estate from 1748 to 1785 passed: but in this recovery deed of 1816, though the words "part or parcel of the *demesne lands* of *Cefn Coch*" occur, the *estate* of *Cefn Coch* is not previously mentioned.]

[*Bayley* B.—The *Attorney General* v. *Vigors*, with many other cases, arose on residuary clauses in wills. Is there any case of a conveyance in which, after a specific enumeration of particular fields as parts of an estate or demesne, general words have passed the residue to the grantee? Here five fields are specifically omitted in the recovery deed of 1816, and are mentioned as parcel of *Tyddyn y Felin Cefn Coch* in that of 1824. The inference is, that those are five fields omitted in former conveyances. *Doe* v. *Jeyes* is distinguishable, for there some of the judges held, that the assignment of settlor's household goods shewed an intent to convey his whole estate, including that previously settled. The identity of the five fields not named in the deed of 1816, and "all those five fields" described in the deed of 1824, is not established. The description in that deed being merely *Tyddyn y Melin Cefn Coch*, or the house of the mill of *Cefn Coch*, points to the severance of the five

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fields from *Melin y Cefn Coch* after 1739, when that tenement was so described.]

*Cur. adv. vult.*

Lord LYNDHURST C. B. delivered the judgment of the Court.—By the recovery deed of 1739, *Thomas Meyrick* conveyed the *Cefn Coch* property, describing it generally, and settling it on himself for life, remainder in tail general to his first and second sons, and to his daughter, the lessor of the plaintiff. The *Cefn Coch* property consisted of a capital messuage, thirteen closes of land, a corn-grist water-mill called *Melin y Cefn Coch*, a fulling-mill called *Pandy Cefn Coch*, and certain closes contiguous to each of those mills. The elder son, *William Meyrick*, took under that entail, and in 1816 suffered a recovery of specific parts of the *Cefn Coch* property, which did not include the mills or the closes belonging or contiguous to either of them. In the recovery deed he declared his intention of conveying the property thereinafter particularly described, and then specifically mentions the capital mansion-house with its appurtenances, and certain closes of land "commonly called or known by the several names of" (setting forth the names of eight closes), and described as part and parcel of the demesne lands of *Cefn Coch*.

Pausing here, it appears impossible to suppose that *William Meyrick* meant to convey the five closes now in question by that recovery deed. The *Cefn Coch* property consisted of thirteen closes, besides the house and mills, and he states his intention to cut off the entail of the mansion-house and premises "thereinafter particularly mentioned." He mentions the mansion and eight closes by their names, saying they are "*part and parcel* of the demesne lands of *Cefn Coch*." It does not appear to us that the five fields are included in

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the abovede scription; reliance, however, was placed on the generality of the expressions following the particular description. But we think that general words following so minute a description as preceded, cannot convey other lands not previously described.

In *Lord North* v. *the Bishop of Ely*, cited in *Turpine* v. *Forreyner* and others (*a*), the predecessor of the bishop had made a lease of his mansion-house, of the site thereof, and of certain particular closes and demesnes specifically named. This description was followed by general words, "and of all other his lands and demesnes." Upon this it was questioned, Whether an ancient park and copyhold land there should pass? and it was held in the negative, for that neither park or copyhold could be intended to be *demesnes;* and that in such cases a grant shall not receive any violent construction but according to the intention of the law. And *Plowden's Commentaries* (*b*) were cited, that *ex precedentibus et consequentibus optima fiat interpretatio*, and that *benigne faciendæ interpretationes sunt*, and according to the intention of the parties.

We are therefore of opinion, that the five closes in question did not pass under the particular or general words of the deed of 1816.

The next question is, Whether or not the five closes in contest passed by the recovery deed of 1824? Now *Thomas Meyrick* by that deed recites the deed of 1739, but also recites that the property he conveyed was property which did not pass by the deed of 1816. He conveyed specifically the two mills of *Pandy Cefn Coch* and *Tyddyn y Felin Cefn Coch*, describing them as "all those messuages, tenements, lands and here-

(*a*) 1 Bulstrode, 100. As to *demesnes*, see *post*, *Attorney General* v. *Parsons*.

(*b*) *Hill* v. *Granger*, fol. 106. And see Co. Lit. 36. 5 Co. 556. Gilbert's Cases, 15.

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ditaments called or known by the name of *Tyddyn y Felin Cefn Coch*," and then proceeded to convey five fields by this description, "and also all those five fields, closes, pieces or parcels of land, part of *Tyddyn y Felin Cefn Coch* aforesaid, situate in the parish of *Llanfechell* aforesaid, and now or late in the holding of the said *Thomas Meyrick*, his undertenants or assigns, and containing by estimation thirty-four acres or thereabouts.

The question being, Whether under that description these five fields passed, it is to be observed that those held and claimed by the defendant, correspond in number of closes and in the quantity of land contained in them, and surround the mill of *Tyddyn y Felin Cefn Coch* on three sides; nor are any other five closes similar to them in those particulars. So far, therefore, we should be of opinion that they passed by the recovery deed of 1824. But it has been objected, that they are described, not as parcels of the demesne, but as pieces or parcels of land or ground, part of *Tyddyn y Felin Cefn Coch;* whereas they could not pass as part of that tenement as it formerly existed because the property originally annexed to it was only eleven acres. They could not be described as part of the demesnes of *Cefn Coch*, for they were separated therefrom by the deed of 1816. However, new property having been since added, and the whole having been in the same occupation both before and after the dates of the respective deeds, and there being no other five fields corresponding in point of quantity, we think them to be property newly annexed to the mill, and sufficiently identified, in order to their passing by the settlement of 1824. The consequence is, that the defendant, as widow of *Thomas Meyrick*, junior, is entitled to these five fields (*a*).

(*a*) A point as to disclaimer of tenancy of other property was argued, but its result did not affect the main question, or seem useful to be reported.

## *IN THE EXCHEQUER CHAMBER.*

## GIBB *against* MATHER and Others.

(In Error from the King's Bench.)

Before TINDAL L. C. J.—Lord LYNDHURST L. C. B. ALLAN PARK and BOSANQUET, Justices.—BAYLEY, GARROW, and VAUGHAN, Barons.

THIS case came on originally for trial before *J. Parke*, J. at the last Summer Assizes for *Lancashire*. Assumpsit on a bill of exchange by indorsee against drawer. The declaration stated that the defendant (*a*), on *27 September*, 1828, at *Liverpool*, in the county of *Lancaster*, according to the usage and custom of merchants, made and drew a certain bill of exchange in writing, and then and there directed the said bill of exchange to Messrs. *Chapman* and *Fairclough*, and then and there required the said Messrs. *C.* and *F.*, four months after the date thereof, *to pay to the order of the defendant, in London*, 175*l.* 10*s.* value received in timber; which bill the said Messrs. *C.* and *F.* afterwards, to wit, on &c., at &c., accepted, according to the said custom and usage of merchants, *payable at Messrs. Jones, Loyd, & Co. bankers, London.* Indorsement by defendant, by *J. K.* his agent in that behalf, to *J. M.*, and by *J. M.* to plaintiffs.

Averment, that afterwards, to wit, on &c., at &c., *at Liverpool* &c., *the said bill was shown and presented*

A bill of exchange is drawn requiring payment to be made at a particular place mentioned in the body, viz. in *London*. The drawee accepts payable at a banking-house there, viz. at *Jones, Loyd*, & Co. without further expression:—Held, that presentment to the acceptor at the place named in the acceptance was necessary to charge the *drawer*.

(a) The plaintiff in error is throughout this report termed *defendant*, and the defendant in error *plaintiff*; a course not uncommonly adopted in arguments in error.

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*to the said Messrs. C. & F., upon whom the said bill was drawn, for payment thereof,* and the said Messrs. *C.* and *F.* were then and there required to pay the same, but that the said Messrs. *C.* and *F.* did not, when the said bill was so shown and presented to them for payment as aforesaid, or at any other time, pay the same or any part thereof, but on the contrary thereof then and there wholly refused so to do, and therein wholly failed and made default; of which said several premises the defendant afterwards, to wit, on &c., at &c., had notice. By reason whereof and by force of the said usage and custom of merchants the defendant then and there became liable to pay to the plaintiffs the said sum of money in the said bill mentioned when he the defendant should be thereunto afterwards requested, and promised accordingly.

A second count alleged that the acceptors were *at Liverpool required to pay the bill according to the tenor and effect* of the bill and of the indorsements thereon.

A third alleged that the bill was *at Liverpool in due manner shown and presented* to the acceptors.

The plaintiffs were partners in trade and holders of the following bill:—

"*Liverpool, 27 Sept.* 1828.

Four months after date pay to the order of myself *in London* 175*l.* 10*s.* value received in timber.

*Duncan Gibb.*

To Messrs. *Chapman* and *Fairclough, Liverpool.*

*Payable in London.*"

The bill was thus accepted:—"Accepted at Messrs. *Jones, Loyd* and Co. bankers, *London.* *Chapman* and *Fairclough.*" The indorsements were as follow:—"*P.* pro *Duncan Gibb. John Kempster.*" The handwriting of defendant as drawer was proved, as was that of *Fairclough,* a partner of the accepting firm, who

received the bill from the drawer in person after acceptance, and returned it to him in the same manner.

The authority of *J. Kempster* to indorse the bill on behalf of defendant was shown, as also his handwriting to the indorsement.

On 30 *Jan.* 1829, the bill was presented for payment at *Liverpool* to the acceptors, *Chapman* and *Fairclough*, who refused to pay it, and on that day notice was given by the plaintiffs to the defendant of the presentment of the bill to the said acceptors, and of their refusal to pay. These facts being admitted by defendant's counsel, *Parke*, J. charged the jury that the matters so produced in evidence and admitted to be true, entitled the plaintiffs to a verdict. Verdict for plaintiffs. A bill of exceptions being tendered by the defendant's counsel, the present writ of error was brought, and was now argued by

*F. Kelly* for the defendant (*a*). The question is, whether, if by terms used in the body of a bill, the drawees are required to pay a sum to the order of the drawer *in London*, with the further addition to the direction to the drawees for acceptance of "payable in London," and they do accept accordingly: must a presentment be made in *London* in order to charge the drawer? That depends on two propositions. 1. Before 1 & 2 G. 4. c. 78. it would have been necessary, in order to charge the drawer of this bill to present in *London*, in whatever terms the acceptance was. 2. Whatever effect the statute 1 & 2 G. 4. c. 78. has on acceptors and acceptances, it has none on drawers. To elucidate these propositions, the state of the law at the time of passing the act is material. Before that act the Courts of K. B. and C. P. had differed as to the effect of *acceptances* of bills payable at particular places. The K. B.

(*a*) See 189, note (*a*).

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held, that as the acceptor was liable every where, a demand at the particular place was unnecessary to be averred or proved:—thus, considering the addition of a particular place to the acceptance to be an expansion or memorandum for the convenience of the parties, and to operate in addition to the effect of the general acceptance; but denying it to be such a qualification of the acceptor's contract to pay every where as would make it imperative on the holder to present the bill accordingly, or to aver or prove such presentment. But the contrary holding of the Common Pleas, that even in order to charge the acceptor it was necessary to present the bill at the particular place named by him, was upheld in *Dom. Proc.* in *Rowe* v. *Young* (*a*). Stat. 1 & 2 G. 4. c. 78, was immediately passed to establish the liability of the acceptor at a particular place to be such as it was held to be in K. B., unless the words *and not otherwise or elsewhere* were added to the acceptance. But there had been no difference of opinion as to the liability of drawers; neither title, preamble, nor enactment of that act affect any other persons than acceptors; and it has been always held, that where the maker, by incorporating restrictive words in the original form of a note, promises to pay at a place named, the holder is bound to aver and prove presentment there in order to charge even the *maker* (*b*). Now the maker of a note and acceptor of a bill *primâ facie* admit an antecedent debt, but a drawer does not; *à fortiori*, therefore, he would not have been liable without such proof of presentment. In *Roche* v. *Campbell* (*c*) the note in its body promised

(*a*) 2 Br. & B. 165.

(*b*) *Saunderson* v. *Bowes*, 14 East, 500.

(*c*) 3 Campb. 247. And see *Hodges* v. *Fillis*, id. 463, indorsee v. acceptor of a bill drawn "payable in London." *Selby* v. *Eden*, 3 Bing. 611, on a bill similarly drawn since stat. 1 & 2 G. 4. c. 78.

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to pay at a particular place; and Lord *Ellenborough* held, that the omission to aver the qualified place of payment was a fatal variance even as against the indorser, who became liable on his indorsement only. Before stat. 1 & 2 G. 4. drawers possessed power to relieve themselves of their general liability to pay every where, by limiting the place of payment in the body of the bill. The act has given the same power to acceptors. Suppose there had been no acceptance, the drawer makes the bill payable at a particular place where he knows the acceptor to possess funds, and by passing the bill before acceptance makes himself liable according to its tenor and effect, *i. e.* if the bill is presented and not paid at the place and time named therein. In *Rowe* v. *Young* (*a*), Lord *Tenterden* says, that "in estimation of law all bills are to be considered as drawn for value," and that "a person drawing a bill under such circumstances may be permitted to elect for himself the time and place of payment, because if the drawer should refuse to pay according to such election he would be able to sue him for the sum which constitutes the value of the bill, either immediately if the value has been previously received, or so soon as it shall be received, according to the intention on which the bill is drawn:" thus concisely stating the settled law, that on failure to accept according to any one of the terms in the bill, the drawee is liable to an action for the consideration. Here the bill having been accepted generally before it passed out of the drawer's hands, it may be said that the drawer cannot object that payment has not been demanded at the place specified; but the liability of each party can only depend on the form of the bill; nor is there any case to show that the drawer, by issuing a bill after acceptance, gives other force to it than the acceptance in terms conveys.

(*a*) 2 Br. & B. 275.

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In declarations against the drawer or indorser of a bill no acceptance is stated, and if stated is immaterial to be proved (*a*), they being at all events liable, on default of drawee, to pay according to the terms of the bill drawn. That being the course of pleading, how can the acceptance, a matter collateral to the bill itself, vary the drawer's liability, which arises on the bill only? Thus, though acceptor may restrict his liability, and may accept for less than the amount drawn for (*b*), he cannot enlarge the terms of the drawer's liability; nor does the drawer, by issuing the bill after the expansion of the acceptor's contract, do more than assent to that act of the acceptor.

*Roscoe* contrà. As the acceptor has not only made the bill payable wherever he shall be, but in *London* also, he has by this acceptance complied with the requisition of the drawer of the bill. In *De Bergareche* v. *Pillin* (*c*), *Best* C. J. states the result of the act to be, that though a bill be by the acceptance made payable at a particular place, still the acceptance is to be esteemed a general obligation, and the acceptor may be called on elsewhere as well as at the place indicated. But though the legislature has provided that the acceptor *may* be called on elsewhere, it has not made it *compulsory* on the holder to go elsewhere. Now what is the liability of the drawer? It is to pay the bill on default of payment by acceptor after due presentment.

[*Bayley* B. As against the acceptor no presentment at all to him would be necessary (*d*), but some place of payment must be pointed out at which a presentment

(*a*) *Tanner* v. *Bean*, 4 B. & C. 312. *Jones* v. *Morgan*, 2 Campb. 474. And see the direction in *Reg. Gen.* T. 1 W. 4. Vol. I. 529.

(*b*) *Wegerstoffe* v. *Keene*, Stra. 214.

(*c*) 3 Bingh. 476.

(*d*) See 3 Bingh. 613.

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must be made in order to charge the drawer; and the question is, where?]

If the liability of the drawer depends on that of the acceptor, then a presentment good against the acceptor would be good against drawer, and there is no decision hitherto stated sufficient to shew this not to be a proper presentment against the acceptor. The words of 1 & 2 G. 4. c. 78. that such an acceptance as the present shall be deemed a general acceptance *to all intents and purposes*, would be useless, if it were held that a special presentment was necessary to charge the drawer which was not necessary against the acceptor. In *Fayle* v. *Bird* (*a*), the Court of King's Bench confirmed *Selby* v. *Eden* (*b*). In the latter case a bill *drawn* payable in *London*, was accepted as drawn; the acceptance was held general and presentment in *London* was held unnecessary to be averred or proved in order to charge the acceptor. If an acceptor accepts generally, he is bound to have funds every where.

[Lord *Lyndhurst* C. B. Can the place of payment be varied by the drawee in his acceptance any further than by merely restricting it to a particular place in the manner pointed out by the statute, and thus making presentment there necessary? But whether he can vary the place of payment fixed by the drawer by extension, is the very point in question. Under his general acceptance this acceptor would be bound to have funds at all events in *London* and *Liverpool*. Does not that increase the risk of the drawer? To avoid his full liability his acceptance should have been specially payable in *London*, and not otherwise or elsewhere; but this is a general acceptance, and if not so held against the drawer, the terms of the statute "all intents and purposes" are ineffectual.]

(*a*) 6 B. & C. 531. (*b*) 5 Bing. 611, A. D. 1826.

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The drawer being cognizant of the terms of the acceptance before he indorsed the bill, cannot be discharged by a variation from its terms, and if otherwise he must show some inconvenience to have resulted from it.

*Kelly*, in reply. The cases in C. P. do not apply, being both against acceptors liable by virtue of their acceptances. *Quoad* drawer, the form of acceptance varies the way in which presentment should be made, and in *Fayle* v. *Bird* Lord *Tenterden* at first thought a presentment in *London* necessary, though he afterwards assented to *Selby* v. *Eden*, for the sake of uniformity. The form of pleading shows that acceptance need only be stated in actions against acceptors. The liabilities of drawer and acceptor cannot be assimilated in pleading or proof.

*Cur. adv. vult.*

TINDAL C. J. delivered the judgment of the Court. This was an action by the indorsees against the drawer of a bill of exchange, after nonpayment of the bill by the acceptors. Upon the trial of the cause it appeared upon production of the bill, that the drawer in the body of the bill required the drawees to pay to the order of himself, "*in London*," the sum mentioned therein; that the bill was addressed to Messrs. *Chapman* and *Fairclough, Liverpool*, with the additional words "payable in *London*;" and that it was by them accepted "at Messrs. *Jones, Loyd* and *Co.* Bankers, *London*." It appeared further, that upon the day the bill became due, it was presented for payment to the acceptors at *Liverpool*, who refused payment, and that due notice of such refusal was given to the defendant. The learned judge who tried the cause directed the jury that the evidence above stated was sufficient to entitle the plaintiffs to recover, and

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the jury found their verdict accordingly for the plaintiffs below. The propriety of this direction now comes before us, upon a bill of exceptions tendered by the defendant below; and the question raised for our consideration is this, Whether, in an action against the drawer of the bill above set forth on the ground of non-payment by the acceptors, it is or is not necessary to prove a presentment for payment at the banking house in *London*, where the same is made specially payable by the acceptance? And we are all of opinion that such special presentment is necessary, in order to enable the holder to recover against the drawer of the bill.

Before the passing of the statute 1 & 2 G. 4. c. 78. it was a subject of considerable doubt in the Courts of law, whether, in the case of a bill drawn generally, but accepted payable specially at a particular place, an action could be maintained against the *acceptor*, without averring in the declaration and proving at the trial, presentment for payment at the place where the drawee had by his acceptance made the bill payable. Upon that point, the Court of Common Pleas had held a presentment of the bill at the place named in the acceptance to be necessary, on the ground that it was a qualified acceptance only; the Court of King's Bench, on the contrary, had held it unnecessary to make any such presentment, on the ground that the acceptance was a general acceptance, with a mere intimation of a place of payment if the holder thought proper to apply there. The conflicting opinions of the two Courts upon that point were set at rest before the framing of the statute, by the judgment of the House of Lords in the case of *Rowe* v. *Young* (*a*), by which judgment the opinion held by the Court of Common Pleas was decided to be the law of the land.

(*a*) 2 Brod. & Bing. Rep. 165.

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But the doubt which had been formed was confined to the case where the question arose between the holder and the acceptor; in cases between the indorsee and the drawer, upon a special acceptance by the drawee, no doubt appears to have existed but that a presentment at the place specially designated in the acceptance, was necessary, in order to make the drawer liable upon the dishonour of the bill by the acceptor.

Still less did the doubt ever extend to cases where the drawer directed by the body of the bill that the money should be payable at a particular place. In such a case all the Courts at *Westminster* agreed that the presentment must be made at the place specially designated in the bill itself. This had been decided in the Court of King's Bench, in the case of a banker's promissory note, which was made payable at a place certain, named in the body of the note. See *Sanderson* v. *Bowes* (*a*). The same doctrine was also laid down in the case of *Roche* v. *Campbell* (*b*), where the action was brought by the indorsee of the note against the indorser. Now no distinction as to this point can be taken between the drawer of a bill of exchange and the indorser of a promissory note. As to their liability to the holder they stand precisely in the same situation. It is the acceptor of the bill, and the maker of the note, who are primarily liable to the holder: and the drawer of the bill, like the indorser of the note, do not become liable, until there has been a due presentment made to the party liable in the first instance to pay the bill. The law, therefore, which applies to the indorser of the note, will also govern the case of the drawer of a bill.

Such then being the state of the drawee's liability

(*a*) 14 East's Rep. 500. (*b*) 3 Camp. 247.

at the time the statute was passed, it must still remain the same, unless that statute has made an alteration therein. But it appears to us that the statute neither intended to alter, nor has it in any manner altered the liability of *drawers* of bills of exchange, but that it is confined in its operation to the case of *acceptors* alone. The title of the act is "An act to regulate acceptances of bills of exchange," and after reciting that it has been adjudged that where a bill is accepted payable at a banker's, the acceptance thereof is not a general but a qualified acceptance, but that a general practice and understanding had prevailed amongst merchants, that such acceptance was a general acceptance, it proceeds to enact, that after the passing of that act such an acceptance shall be deemed and taken to be to all intents and purposes a general acceptance of such bill, unless the acceptance is restricted to payment at the particular place by the words and in the manner directed in the act.

The very reference in the statute to the adjudication by law, imports that the legislature intended the statute to apply to those cases only in which doubts had previously existed, and which had been adjudged in law; not to cases like the present, which were free from doubt at the time of passing the act. Again, the enactment comprehends in terms the case of acceptors, and acceptors only, and is silent altogether upon the subject of the liability of drawers and indorsers. It foresees the inconvenience which is cast upon acceptors, by the enactment that an acceptance of a bill payable at a particular house, shall thenceforth be considered as a general acceptance, and it gives the acceptor the power of protecting himself against such inconvenience, by the use of restrictive words in his acceptance. But the inconvenience is as great to the drawer as to the acceptor. If the drawer has directed

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his money to be paid at a particular place, and after an acceptance made payable at that place, the bill should be returned to him dishonoured without a presentment to the house where it is made payable, it is as great an hardship upon him, as the act had contemplated and provided for in the case of the acceptor. If then the statute had intended the enactment to apply to the case of the drawer, we cannot but think the same protection would have been given to the drawer, which had been given in terms to the acceptor of the bill.

One argument advanced on the part of the defendant in error is, that the acceptor has varied in his acceptance from the original terms in which the bill was drawn, and as the drawer has been contented to take back the bill with such varied acceptance, it must now be considered as a general acceptance, under the operation of the late statute.

But the answer to this argument seems to be that the direction contained in the body of the bill is not altered or varied by the terms of the acceptance, any further than was necessary for the benefit of the drawer and of all subsequent parties. The drawer directed the drawee to pay the money in *London*, the drawee accepts, specifying the particular house in *London*, at which he intends to pay the bill. Without such specification the acceptance might be useless from its generality, and the form of the bill implies that the drawer expected and intended the drawee to make it.

We therefore think, that as no presentment was made at the house of the banker's in *London*, where the acceptor had undertaken to pay it, the liability of the drawer never arose, and consequently that the judgment which has been given for the plaintiff below must be reversed.

Judgment reversed.

## *IN THE EXCHEQUER CHAMBER.*

TRAFFORD and Others *against* The KING, on the prosecution of the Trustees of the late Duke of BRIDGEWATER.

(In Error from the King's Bench.)

Indictment for a nuisance to a public canal navigation, established by statute in 1763. Special verdict, that the canal was carried across a river and the adjoining valley by means of an aqueduct and embankment, in which latter were several arches

INDICTMENT for a nuisance. The first count stated, That after the passing of a certain statute of 2 G. 3, *viz.* in 1763, a canal was made pursuant to the said statute, which from that time had been used by all the king's subjects with vessels not exceeding thirty tons burden, on payment of certain reasonable tolls: that the canal, by means of an aqueduct made pursuant to the act, passed over the river *Mersey* near the junction of a brook called *Chorlton Brook;* and that the defendants on the 1st *January* 1770, and on other days, raised divers mounds, &c. near the ancient banks and culverts: That a brook fell into the river above its point of intersection with the canal; and that in time of flood the water which was then penned back into the brook overflowed its banks, and was carried by the natural level of the country to the above-mentioned arches, and through them to the river, doing much damage to the lands over which it passed: That, except for the artificial embankments called fenders, after mentioned, the arches in the aqueduct would be sufficiently wide for the passage of the river at all times but those of high flood, notwithstanding the increase of water by improved drainage of the country: That the defendants, occupiers of lands adjoining the river and brook, had, since the making the canal, aqueduct and embankment, heightened certain fenders, constructed from time to time as occasion required on their respective lands, so as to prevent the flood-water from escaping over them; and that the water had consequently in time of flood come down in so large a body against the aqueduct and canal banks as to endanger them, and obstruct the navigation: That the fenders were not unnecessarily high, and if reduced, many hundred acres would again be exposed to inundation.

Held, that before the court could decide on the case, it should have been found—1. Whether before the making the canal embankment the landowners exercised any right to raise the banks from time to time, so as to keep the water at all times in the ordinary channel and prevent its overflowing its banks in time of flood; or whether that practice commenced since 1763, when the canal was commenced. 2. Whether the course described by the special verdict, by which the flood-water was conveyed into the river at a lower point, was the ancient and rightful course or not. 3. Whether or not the raising the fenders to the present height had become necessary in consequence of the construction of the aqueduct and embankment.

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of the said river and brook, *viz.* in parts thereof near the said aqueduct, and severally continued the same so raised, &c., whereby water was at divers times forced against the said aqueduct and the sides and foundations thereof, and the sides and foundations of the said canal adjacent thereto, which water ought to have flowed, and but for the said mounds would have flowed and escaped by other ways, *viz.* over parts of the banks of the river and brook: By which means the said aqueduct and the sides and foundations thereof, and of the canal adjoining thereto, had been injured, and were placed in danger of being broken down and destroyed, to the damage and common nuisance of the subjects using the said canal, and of the inhabitants and occupiers of the lands adjacent, &c. Other counts charged the defendants with severally raising and erecting mounds, &c., and wrongfully continuing mounds, &c. theretofore injuriously erected. One count charged the injury to be done by confining the water and causing it to break down the banks of the river and damage the adjacent lands, as well as the aqueduct and canal. Plea, not guilty. At the trial before *Bayley* J. at the Summer Assizes for the county of *Lancaster*, 1829, the following special verdict was found, upon which the Court of King's Bench gave judgment for the crown.

In 1763 the navigable canal mentioned in the indictment was made from *Longford Bridge* in the township of *Shetford*, to the river *Mersey*, at a place called the *Hemp Stones*, in the township of *Halton*, in pursuance of an act of 2 G. 3. c. 11, enabling the then Duke of *Bridgewater* to make the same; and the king's subjects, ever since the making of the canal, have navigated it with boats not exceeding thirty tons burthen, at their free will and pleasure, paying the duty by law established. The canal extends for half a mile north

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and south across a vale, through which the river *Mersey* runs in a westerly direction. It is upon the same level throughout, and raised by artificial embankments on each side through the whole half mile, and is carried across the river by an aqueduct of one arch (mentioned in the indictment), which was built at the time of making the canal. At the distance of 430 yards from the river, towards the north, the canal is supported upon three arches, also built at the last-mentioned time: on the south side it has two culverts at 160 and 460 yards distance from the river, one made at the same time with the canal, the other built by the trustees of the late Duke of *Bridgewater* (the proprietors of the canal) in 1806. About 800 yards above the aqueduct the river is joined from the east by *Chorlton Brook*, the capacity of which, at the junction, is equal to one-tenth of the capacity of the river at the same point; and after this junction, the river, which had before flowed northward, turns immediately to the west.

On each side of the river, and also of the brook, there are now artificial banks called fenders, made to prevent the water, in times of flood, from overflowing the adjacent lands. These fenders have from time to time been raised as occasion required by proprietors and occupiers of adjoining lands; and the fenders on the banks of the river, on the north side, are now three feet higher than they were twenty years ago; the fenders on the northern banks of the brook are two feet three inches higher than they were at the same period. Before the banks of the river and of the brook were so raised, the water of the river, in times of flood, was frequently penned back up the brook, and, together with the water of the brook, ran over the north bank of the brook, and inundating certain lands (the situation of which was particularly described in the verdict) made

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its way to the three arches above mentioned, on the north side of the river. After passing through these it flowed along a low tract of land, until it fell into the river again, at a place called *Ermston*, two miles from the said three arches, inundating in its course, both above and below the arches, many hundred acres of land, throwing down hedges, and otherwise doing much mischief. No regular watercourse was ever kept open for the flood-water. Since the banks of the river and of the brook have been raised as above mentioned, the flood-water, whenever it has overflowed or broken down the banks of the brook, has taken the same course to the three arches. The whole three arches are not necessary for any other purpose than for the passage of such flood-water; one arch, of small dimensions, would be sufficient for the passage of all other water collected at that place. At times, since the making of the canal, the water of the river has overflowed the banks above its junction with the brook, and has inundated a tract of land on the south and west of the river; and by reason of the embankment on which the canal is raised, and of the want of sufficient outlets underneath, this flood-water has (particularly in the year 1806) broken down the south bank of the river between the aqueduct and the brook, passed across the river, and broken down the north bank; and then, after inundating the adjoining lands, flowed down to the three arches before mentioned. In 1806 the trustees of the Duke of *Bridgewater* (the then proprietors of the canal), on complaint from the landowners on the north bank of the river, made them compensation for the damage so sustained; and they have, since that time, paid an annual rent or compensation for a piece of land on the south side, which was on that occasion washed away. They have also from time to time repaired the

south bank of the river, and the fender thereon, to the extent of fifty yards eastward from the canal.

The verdict then described the particular fields and fenders belonging to the several defendants, and it appeared that every fender was much higher than the land to the north of it, and that the fenders on the banks of the river and brook had been raised from time to time within the last six years, and kept and continued so raised by the defendants severally in their respective occupations, but not jointly. It also described the level of the lands through which the flood-water was accustomed to escape in the direction of the three arches as first above mentioned, and also the level of the bed of the river for some miles above its junction with the brook. A statement was then given of injuries sustained in *July* 1828, when the flood-water broke the banks of the river and canal (the navigation of which was stopped), and ultimately flowed down to the three arches before mentioned.

The improved drainage of the country higher up the river for many miles, has occasioned a greater quantity of water to flow down the river to the aqueduct than used to flow to it for several years after it was built; but the aqueduct is still wide enough for the river-water to pass at all times, except in high floods. The raising of the fenders on the banks of the river, and of the brook, has occasioned a much greater quantity of water to flow to the aqueduct in high floods than did or could flow to it for several years immediately after it was built, and has rendered it insufficient for the passage of the water in high floods, and thereby greatly endangered the canal. If the fenders on the banks of the river and of the brook were reduced to the height at which they were twenty years ago, a great part of the waters of the river and brook, in high floods, would

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overflow the banks of the brook and inundate the neighbouring lands, and would take the direction in which the flood-water used formerly to flow to the said three arches, and thence to *Ermston;* but many hundred acres of land would thereby be inundated, and great injury done to the owners and occupiers of that land. The fenders on the banks of the river and of the brook, have not been raised more than was necessary to prevent the lands being inundated.

*F. Pollock* for the landowners the defendants (*a*), argued the question on the facts found; stating the questions to be, Whether the defendants had been guilty of a wrong in heightening from time to time the fenders or embankments of the river in order to protect their adjoining lands from flood; and whether the inconveniences which had gradually arisen from so doing were to be cast on the proprietors of the canal, or of the lands. He contended that the canal company were not entitled to keep their aqueduct as they made it in 1763, and that as they were by the private act of 2 G. 3. c. 11. § 14. compelled from time to time to make sufficient water-ways, they ought to have enlarged the arch, if required by any alteration in the bed of the river beneath, or by an additional quantity of water passing over it. If it be true that the bed of a river has risen from a gradual settling of matters flowing along its course, the owners of lands adjacent must be entitled to raise the banks from time to time, if necessary, to prevent flood.

(*a*) *Viz.* the plaintiffs in error. The arguments of counsel are here stated very shortly, the judgment of the court having mainly turned on the wording of the special verdict, and the examination of the plans handed in by both parties.

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*Wightman* contrà for the crown (*a*). When this canal was constructed, Mr. *Brindley* the engineer made a provision for water-way of the river, which, till the defendants raised its banks, proved sufficient.

[Lord *Lyndhurst*. Perhaps it was constructed without a view to increased drainage.]

Now, though the owners of the adjacent lands may have a right to raise embankments against ordinary floods, they cannot raise them to an arbitrary height, so as to occasion an injury to the canal company by overtopping and destroying the arch of their aqueduct. Before erecting the fenders the water escaped over the banks.

*Cur. adv. vult.*

TINDAL C. J. afterwards delivered the judgment of the court. Upon this special verdict, in which judgment has been given for the crown by the court of King's Bench, such judgment appears to have proceeded expressly on the principle, that the *antient* course and outlet of the floodwater had been obstructed by the wrongful raising, from time to time, of the fenders therein described, by the defendants below.

Whilst, however, we agree in the principle so laid down by the court, we are unable to discover upon this special verdict a finding of sufficient facts to warrant its application to the present case; to be illegal, we think in the first place it ought to appear distinctly upon the special verdict, that the raising and heightening of the fenders on the lands of the respective defendants, was not an accustomed and rightful usage which has obtained from time to time; that it was an enjoyment beginning since the construction of the canal in 1763, not sanctioned by antient usage, or by the

(*a*) *Viz.* the defendant in error.

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ordinary right *primâ facie* possessed by every man to protect his own property, provided he can do it without injury to others; and that it ought also to appear distinctly that the course which the floodwater is stated in the special verdict to have taken, and by which it was carried again into the river at a lower point, was the antient and rightful course which it ought to take. And we think in the second place, that it ought not to be left in doubt upon the facts found in the verdict, whether the raising the fenders to their present height has or has not become necessary in consequence of the construction of the aqueduct and embankment; but on the contrary we think, that it ought to appear distinctly upon the finding of the jury either that the embankment and the aqueduct have not wrongfully penned back more water upon the lands of the defendants than was formerly collected in times of flood, or that the banks of the river and brook have been raised without any necessity, and not in self defence against the consequences of the construction of the embankment and aqueduct; or at all events, that the banks had been raised by the defendants to an unreasonable and unnecessary height; and as those facts are left in doubt upon the special verdict, we think no judgment can be given against the defendants.

Upon the point firstly above suggested, there appears no doubt but that at the common law the landholders would have the right to raise the banks of the river and brook from time to time as it became necessary upon their own lands, so as to confine the floodwater within the banks, and to prevent it from overflowing their own lands, with this single restriction, that they did not thereby occasion any injury to the lands or property of other persons; and if this right had actually been exercised and enjoyed by them before the passing of the act, then the construction of the aqueduct and

embankment may be considered as having taken place subject to the enjoyment of such rights as the landholders possessed at the time of passing the act, unless so far as it may have restrained the exercise of such rights. It appears, therefore, to us, to be indispensable, in order to determine whether the acts of the defendants stated in the indictment are wrongful or not, that the jury should find such facts as will enable us to say with certainty whether, before the making of the canal and the embankment, there was any exercise by the landholders of the right of raising and heightening the banks from time to time as occasion required, so as to confine the water at all times to the ordinary channel, and prevent it in times of flood from overflowing the banks, or whether the passage over the banks in time of flood was the usual and ordinary course.

But the present special verdict leaves the commencement of the enjoyment of this right in complete uncertainty. It states only that there "*now are*" on each side of the river and brook artificial banks called fenders, which have from time to time been raised as occasion has required. It finds indeed in one part, that these banks are not raised higher than is necessary, a fact very strongly in favour of the defendants; but it gives no date whatever to the origin of these acts of enjoyments on the part of the owners of land adjacent to the river; upon such a finding we do not feel ourselves competent to say whether the acts complained of in the indictment amount to a nuisance or not.

Again: the jury find, that before the banks of the river and brook were raised, the water of the river and brook was frequently penned back and flowed over the north bank by a track or course which is described in the verdict, and which is stated to fall into the river again at a place called *Ermston*, about two miles below

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the three arches. But it no where appears whether the floodwater was carried in that course before the aqueduct was made, nor whether it had been so carried for such a period of years over the lands of different persons as to constitute a right of watercourse in time of flood in the direction described by the special verdict. But in order to establish the charge against the defendants, it is essential to show, that by their raising and heightening the banks of the river and brook they prevented the water in time of flood from flowing in this particular course; we ought, therefore, to see upon the face of the verdict that there was an existing right to this course for the floodwater over lands described in the verdict, before we find the defendants guilty of the offence charged.

Again: upon the second ground above suggested, we think this special verdict deficient; the special verdict leaves it questionable whether the nuisance complained of, i. e. the danger to the aqueduct and the canal, is not attributable in some degree at least, if not entirely, to the act of the owners of the canal. The special verdict states in terms that since the making of the canal, the water of the river has at different times flowed over the banks much higher up than at the point of its junction with the brook: and then proceeds to state an instance of damage done in 1806, for which the commissioners named in the acts of parliament awarded compensation on account of the insufficiency of the outlet under the canal embankments. Again: in the statement made of the levels of the river above the aqueduct, and of the fall immediately below, an inference at least is afforded that the embankment and the canal have contributed to the penning back of the water; thus creating a necessary and justifiable ground for raising and heightening the banks. Without, however, in any manner

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asserting that such has been the case, or that such is the necessary inference from the facts stated, we only observe that this special verdict does not state with sufficient certainty what is the real cause of the penning back of the water in time of flood, nor whether the raising and heightening of the banks by the defendants had a legal and justifiable commencement, nor what is the rightful course of the floodwater, nor generally does it lay before us such facts as will enable us to say whether the acts done by the defendants are lawful or not, or to give any judgment satisfactorily to ourselves, that should bind the rights of the contending parties. Under these circumstances, the only course we can pursue is to reverse the judgment which has been given for the crown, and to award a *venire de novo*, and if another special verdict should be found, we think it would be desirable that it should contain an express finding of the jury upon the several points to which we have above adverted, rather than the statement of facts from which the finding of the jury is only to be inferred.

**Venire de novo awarded.**

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*IN THE EXCHEQUER OF PLEAS.*

## DOE *d.* BRIGGS *against* ROE.

Service of declaration in ejectment on the wife who merely admits the receipt.

GODSON moved for judgment against the casual ejector on an affidavit of service, stating that deponent went to the house of the tenant in possession and saw a servant maid, who shut the door, and refused to open it, or to receive the declaration and notice, upon which deponent nailed it to the door. Next day the wife of the tenant called on deponent with the declaration

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and notice, and asked what she was to do with that paper. Deponent read it over to her, and explained its object, recommending her to go to the attornies for the lessor of plaintiff; she said she would tell her husband what had passed. *Godson* urged for at least a rule to show cause.

Lord LYNDHURST C. B. This is only an admission by the wife that she received the paper. It cannot affect the husband, or show he was at home.

BAYLEY B. To grant this rule would be to go beyond any other case: Where it is sworn that the wife was living with her husband at the time, it is not necessary to serve her on the premises (*a*); then she might, in this case, have been served at the time she called on the deponent. Again: the service which took place might have sufficed, if it had appeared that the husband was at home, or was acquainted with the service.

The rest of the court concurred.

*Godson* took nothing by his motion.

(*a*) Tidd, 1210, 1216.

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## WATSON *against* LOCKE.

Since 7 & 8 G. 4. c. 71, the court will not increase issues on a distringas issued at common law, but will leave the plaintiff to proceed at his own risk according to the common law course, supposing it still to exist.

A *distringas* to levy 40*s.* had issued against the defendant, according to the old course of the Exchequer, after service of a venire at the defendant's place of abode, and return by the sheriff, that he had summoned the defendant.

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*Price* now moved to increase the issues, on reading the *distringas* and the sheriff's return, and on an affidavit of the amount of the debt, and that no appearance had been entered for defendant. He said it had been repeatedly decided (*a*) that this ancient practice remained, notwithstanding 51 G. 3. c. 124. and 7 & 8 G. 4. c. 71. Those statutes are not applicable, because the plaintiff here seeks to compel the defendant to enter an appearance, and does not proceed under statute 12 G. 1. c. 29. to enter it for him.

[*Bayley* B. In *Moore* v. *Taylor* (*b*), the reporter says, that he was informed that there had been a great struggle when 51 G. 3. c. 124. first passed, whether it should be held to extend to the Court of Exchequer, the officers contending, totis viribus, that it did not; but the court held that it did.]

The summons on the venire in this court affords every information necessary to the defendant. Nor is this distringas founded on a contempt of process, but on the prerogative of this court to proceed in rem, in which the suitors partake. *Pennell* v. *Kingston* (*c*) was an application of an extraordinary nature, and the court was called on to name the sum to which the issues were to be increased.

Lord LYNDHURST C. B. The question turns on the construction of the statute 7 & 8 G. 4. c. 71. and has been settled by *Pennell* v. *Kingston*, which decided that the court will make no order to increase issues on a distringas issued at common law.

BAYLEY B. The intention of the court in *Pennell*

(*a*) See all these cases collected in *Hall* v. *Gumple*, *ante*, vol. i. 490 and 494, *notis*. See the act *id*. 289, *notis*.

(*b*) 5 Taunt. 71, *notis*.

(*c*) Vol. i. 495.

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v. *Kingston* was to leave the parties as they were before that application, and not to interfere. An affidavit of debt existed in that case, and it was always usual for this court to fix the amount to be levied (*a*), but as it was at least very questionable whether the right to issue a distringas and levy issues at common law, had not been taken taken away by the statutes, the court there held that plaintiff might proceed and levy at his own risk if the common law course remained; but that this court would not assist him, and this is a similar case. For if an action of trespass should afterwards be brought against the plaintiff for a levy made under such a distringas, and it should be ultimately decided that the statute had taken away the common law practice, some blame would attach to the court which had lent its aid to an illegal practice.

(*a*) See *Lambe* v. *Lord Blessinton*, 5 Pri. 639, and Dax's Practice, 23.

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## ILSLEY *against* ILSLEY.

The plaintiff's affidavit of debt was in the character of an executor, but the process was general and bailable. The court refused to order the bail bond to be delivered up to be cancelled on account of this variance.

*CHILTON* had obtained a rule to show cause why the bail bond should not be delivered up to be cancelled, on the ground of variance between the affidavit to hold to bail and the writ; the affidavit stating that the debt was owing to the plaintiff as executor, while the process on which the arrest took place was general. He cited Tidd, 9 ed. 147, that in actions *not* bailable the process need not state the special character in which the plaintiff sues, and argued from thence that in bailable cases it must. He also cited *Spalding* v. *Mure* (*b*) to show that where a cause was commenced by bailable process for a debt stated to be due from

(*b*) 6 T. R. 363.

the three defendants, as surviving partners of another deceased, but the subsequent step, viz. the declaration, was for a debt due from the three defendants only, an exoneretur had been entered on the bail-piece. He also cited *Stables* v. *Ashley* (*a*) and *Chapman* v. *Eland* (*b*).

*Ball* showed for cause that the affidavit in support of the rule did not show that any bail-bond existed.

[*Bayley* B. mentioned *Ashworth*, Executrix, v. *Ryall* (*c*).

*Archbold* amicus curiæ, stated *Murrell* v. *Jowett*.

On another day *Chilton* supported his rule. This case has more resemblance to *Turing* v. *Jones* (*e*), and *Douglas* v. *Irlam* (*d*), cited in *Ashworth* v. *Ryal*, than to that case itself; for it does not appear from the report that the affidavit of debt was by the plaintiff as executor.

But *per Curiam* (*f*). In *Ashworth* v. *Ryal* the court of King's Bench assented to the distinction taken in the case of *Murrell* v. *Jowett* (*g*), there cited by Mr. *Archbold* as *amicus curiæ*, viz. that upon general bailable process a plaintiff may declare *qui tam* or in *autre droit*, without losing his bail, viz. bail above: but he cannot declare in his own right on similar process sued out in *autre droit* or *qui tam*. I think that *Ashworth* v. *Ryal* decides the present case; and it is impossible that the bail could have there continued on the bail-piece, or that the rule for an exoneretur should have been discharged, if the affidavit to hold to bail had been by the plaintiff in his own right. For unless it had been by him in his representative character, there would have been a fatal variance between the declara-

(*a*) 1 B. & P. 49. (*b*) 2 New R. 82. (*c*) 1 B. & Adol. 19.
(*d*) 5 T. R. 402. (*e*) 8 T. 416.
(*f*) Lord Lyndhurst, C. B. Bayley, Garrow, and Bolland, Bs.
(*g*) Second edit. Archbold's Pr. 68. Archb. MS. M. 1823,

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tion and the affidavit to hold to bail (*h*), and my note of the case is, that the affidavit to hold to bail was so sworn.

Rule discharged without costs.

(*h*) See Tidd, 9th ed. 294.

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JONES *against* JONES.

A rule nisi for security for costs may be obtained without affidavit of previous application for it to the plaintiff's attorney or agent, but cannot then operate as a stay of proceedings. Or semble without notice of motion.

A defendant makes such a motion at his peril, if it should be too late; therefore he need not state how far the proceedings have gone, and it is for the plaintiff to show that the motion is not in time.

*JOHN JERVIS* obtained a rule calling on the plaintiff for security for costs, with stay of proceedings in the mean time, on an affidavit that he resided abroad, out of the jurisdiction of the court.

*R. V. Richards* showed for cause that the affidavit in support of the rule did not state that any application for security for costs had been previously made to the plaintiff's attorney or agent, and produced an affidavit that negatived such application.

[*Bayley* B. Does it appear in what stage the proceedings were when the motion was made (*a*)?]

Neither affidavit states that. *Bass* v. *Clive* (*b*) decided that the authority of the court was not to be interposed without ascertaining whether the party would refuse to give security: and though that case is so far overruled that such refusal is not necessary to found the motion, if the case appear on the affidavits to be such as requires security to be given (*c*), yet there can at least be no stay of proceedings without such previous application (*d*).

(*a*) See *ante* 166, and see per Dampier, J. 2 Chitt. R. 151.

(*b*) 3 M. & S. 283. M. 1814.

(*c*) *Hancock* v. *Smith*, H. 1820; 2 Chitt. R. 150.

(*d*) See *Hancock* v. *Smith*, and Anonymous case, 2 Chitt. R. 150; *Baille* v. *De Bernales*, 1 B. & Ald. 331.

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BAYLEY B.—The fact that the rule has been drawn up by the officer with a stay of proceedings, though without affidavit that security had been applied for, or that a notice of the motion had been given (*a*), cannot vary the rule which we ought to pronounce. If the plaintiff is out of the jurisdiction, the defendant is entitled to have security for costs, unless it is shown on affidavit that the proceedings are in so late a stage, as to deprive him of that right. The application is made at the defendant's peril if he comes too late, and it is for the plaintiff to show it is too late.

The court refused to give plaintiff costs for the informal drawing up the rule, and made the costs costs in the cause.

*Per Curiam.* Rule absolute.

(*a*) Dax, 127.

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ALLEN and Another *against* GRIPPER and Another.

TROVER for oil cakes. At the London Sittings before Lord *Lyndhurst* C. B. and a special jury, the following facts appeared in evidence:—Plaintiffs were seed crushers resident at *Twickenham*, and on 6th *December*, 1830, verbally contracted, through a broker in *London*, to sell the cakes in question to *Pestall*, who lived at *Baldock* in *Hertfordshire*. On the 13th *December* the broker sent a bought-note to the plaintiffs, who on the 14th shipped the cakes at *Twickenham*, on his customers as they should be wanted, without being sent to his

Goods were sent by water carriage, and deposited in the carrier's warehouse at the end of the voyage in the usual course of business between him and the consignee, viz. to be delivered out to him or residence elsewhere: Held, that the transitus was determined, and that the vendor's right to stop in transitu was gone, though the carrier claimed as such a lien on the goods against the consignee.

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board the barge of *Downes* a carrier on the *Thames*, to be conveyed down the river to the mouth of the *Lea*, there to be transhipped into the defendants' barge to be carried along the *Lea* to *Hertford*, where the defendants resided. No water carriage exists between the latter place and *Baldock*. On the 15th the cakes were transhipped at the mouth of the *Lea*, and on the 17th arrived at defendants' wharf at *Hertford*, and remained there on board their barges till the 20th, on which day they were landed and placed in defendants' warehouse. It appeared that oil cake consigned to *Pestall* from the *Thames* had for some time been warehoused there for sale, without ever being sent to *Baldock*; and that defendants for a long time had been accustomed to supply him and his customers out of that which had been so deposited for the longest period; and it was sworn, that if *Pestall* had sent his carts for oil cakes to the warehouse at the time in question, these oil cakes would not have been sent, but those which had been longer there. It did not appear that he had a warehouse at *Baldock*, or elsewhere, for like deposits. The oil cakes were not to be forwarded to *Pestall* at *Baldock* without fresh orders, but were to go there or to his customers, as he should direct. On the 15th *Pestall*'s insolvency was known on the corn market in *London*, which the defendants were in the habit of attending; but the plaintiffs were ignorant of it till the 20th, when about mid-day they gave notice to the defendants, at the corn market, not to deliver the cakes to *Pestall*. The defendants said, they would not deliver them up to any body, adding, *Pestall* owed them money. A demand of the goods was afterwards made, and the charges due on them tendered by plaintiffs to defendants, but a similar answer was given. The cakes had been moved into the defendants' warehouse on the 20th, before the notice was given to defendants. There was no evi-

dence that any lien was claimed by the defendants in any character but that of carriers.

For the plaintiffs it was contended that the mere circumstance of the defendants having been employed by *Pestall* to warehouse his goods for him, was not enough to defeat the plaintiffs' right to stop them *in transitu*. The Lord Chief Baron left it to the jury, whether the wharf and warehouse of the defendants was the place of final deposit, for the convenience of sale by *Pestall*, or whether they were used merely as a place of landing on their route to his own warehouse? The jury found a verdict for defendants, adding, that they considered the goods were intended to be left at the defendants' warehouse as a place of general deposit for the convenience of sale, and were not to be taken home to *Pestall*'s house.

*Jones* Serjt. moved for a new trial. The immediate question was, whether the *transitus* was at an end on the arrival of the cakes at the warehouse? but that depended on the previous question, whether the defendants' character as carrier had ended? If it had, the plaintiffs could not stop *in transitu*. Now that was not left to the jury. The defendants' character of carriers had never ceased, for as such, and not as warehousemen, they claimed a lien on the goods. Then if their special property as carriers remained, and was not abandoned by them, the consignor's right to stop *in transitu* was not divested; nor did the taking them into the warehouse vary the matter, for it could not be considered as *Pestall*'s. Here, as against the plaintiffs, the defendants say the *transitus* is at an end, and your right to stop is gone, for we have delivered to the consignee; while, as against the consignee *Pestall* they say, we have not delivered the goods, and we have a lien on them as carriers. Now as between the carriers

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and *Pestall* there was no complete delivery, and *Crawshay* v. *Eades* (*a*) shows that where a carrier has begun to deliver to the consignee, but stops in the course of it, his special property remains till the freight for the whole cargo is either tendered or paid, or till he has parted with the possession of the whole; then, as a consequence, the consignor is not divested of his right to stop *in transitu*. The test is the right of the carrier to hold the goods; now that right continues in respect of lien as long as his vessel retains them, which might be, and in this instance was, for long after they had arrived at their place of final deposit. In *Crawshay* v. *Eades*, *Abbott* C. J. says, the whole question was, whether there had been a delivery or not, and *Bayley* J. said, "it is quite clear that if the iron was once completely delivered, the *transitus* was at an end, and the assignees of the consignee would be entitled to retain it. It is incumbent on them, however, to show clearly that such a delivery had been made by the carrier to the vendee as would deprive the former of his lien, for nothing less than that could take away from the vendor his right to stop *in transitu*." Here the defendants say, we have not delivered the goods, and will not deliver them, which is evidence of a conversion. [*Bayley* B.—The question is not whether the right of the defendants as regards the lien is at an end, or whether *Pestall* can claim the goods against them, but, whether your right to stop *in transitu* remains, so as to maintain the action?]

Lord LYNDHURST C. B.—The facts shew that *Pestall* had been in the habit of employing these defendants for several years, their course of business being that the oil cakes purchased by him were carried by water to the defendants' warehouse at *Hertford* in their barges,

(*a*) 1 B. & C. 181.

and were suffered to remain there generally for some months, being delivered out from time to time to *Pestall* or his order, without being carried to his residence, *Baldock*. This particular oil cake arrived in the usual manner; and it was proved, that if *Pestall*'s carts had come for oil cake at the time in question, the newly-arrived cakes would not have been sent, but those which had been longer in the warehouse. It also appeared, that many of *Pestall*'s customers lived near it, so that the deposit there was for his convenience. I left it to the jury whether the warehouse was the final deposit of these cakes? They found it was, and that they were to be deposited like the rest. I think that the verdict should not be disturbed.

BAYLEY B.—The evidence shows that the defendants' warehouse was the place where the goods were to remain; it may therefore, as to them, be considered as the warehouse of *Pestall*. The oil cake was to stay there until it received a new destination, which *Pestall* had then a complete power of directing. The *transitus* contemplated by the plaintiffs as vendors and *Pestall* as purchaser, was then accomplished. *Crawshay* v. *Eades* is quite distinguishable. The question there was, Whether the *transitus* as to any part of the goods was at an end, part of them having been landed. The goods were there sent by water, to be delivered to the wharf of the vendee, which they reached and were in part landed there; but before the right of possession could vest in consignee, they were to be weighed and a receipt to be given to the carrier for the quantity so weighed and delivered. That not having been done, the freight could not be ascertained, nor was it in fact paid, and the court being of opinion that the delivery was not complete, decided therefore that the *transitus* was at an end. *Foster* v. *Frampton* (*a*) is very near the

(*a*) 6 B. & C. 107.

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present case. It was there held, that where a vendor for his own convenience desired a carrier to let goods stay in his warehouse till he received further directions, the *transitus* was at an end. In this case it appears to me, that the original *transitus* ended when the goods reached the warehouse in which the consignee intended them to be deposited to abide further orders from him, without which they would remain stationary (*a*). The right to stop *in transitu* was therefore gone, and the plaintiffs are not entitled to recover.

GARROW B. concurred.

VAUGHAN B.—I think that the character of the defendants as carriers had ceased when the plaintiff attempted to stop the goods *in transitu*. The jury, in fact, found that *Pestall* meant this oil cake to be deposited and warehoused like the rest. Now that was for the convenience of the vendee. *Crawshay* v. *Eades* is perfectly distinguishable; for there the court held the delivery by the carrier incomplete, and that he having a lien on the goods, might take back that part which had been landed, no freight having been paid. I think that the verdict ought not to be disturbed.

**Rule refused (*b*).**

(*a*) See per Lord *Ellenborough*, *Dixon* v. *Baldwin*, 5 East, 186.

(*b*) In *Richardson* v. *Goss*, 3 B. & P. 127, *Chambre* J. said, that if it were necessary to decide whether the *transitus* was at an end, he should strongly incline to think, that if a man be in the habit of using the warehouse of a wharfinger as his own, and make that the depository of his goods and dispose of them there, the journey would be at an end when the goods arrived at such warehouse. That doctrine was approved by Lord *Alvanley* in *Scott* v. *Pettit*, *id.* 472; by *Bayley* J. in *Foster* v. *Frampton*, 6 B. & C. 109; by *A. Park* J. in delivering the judgment of the court of C. P. in *Tucker* v. *Humphrey*, 4 Bing. 521; and receives further confirmation in the principal case. *Semble*, that the decision might have been different had not the goods been *landed* before the attempt to stop them was made; see *Tucker* v. *Humphrey*, 4 Bing. 516; and *semble*, the defendants after landing

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the goods would not have been liable in the character of carriers for any loss, the goods having got to the end of their destined journey; but would have been liable only as warehouse-keepers, in respect of any recompense to be received for warehouse room.

Actual delivery is necessary to devest vendor's right of stoppage *in transitu*, per *Buller* J., *Ellis* v. *Hunt*, 3 T. R. 469; but a delivery at the consignee's place of abode is not necessary, and it seems sufficient if they come to his possession at any other place recognized by him as a place of deposit, *e.g.* a cellar for which he undertook to pay warehouse rent, *Wright* v. *Lawes*, 4 Esp. 82; or at the *terminus ad quem*, being a waggon office, where goods from the same quarter had usually remained till they could be sold and shipped, the consignee having no other warehouse, *Rowe* v. *Pickford*, 8 Taunt. 13: but *secus*, where the place of destination mentioned to consignor by consignee (*e. g. Lisbon*) is not reached, and the goods remain in the hands of the consignee's agent at an intermediate place (*London*), without any act of ownership by consignee. *Coates* v. *Railton*, 6 B. & C. 422.

The right of stoppage *in transitu* is more clearly devested where the consignee exercises any act of ownership over the goods, though at any intermediate place of deposit, *e. g.* by tasting wine in a cellar where it had been lodged by his sanction, *Wright* v. *Lawes*; unpacking at a packer's, where part of the goods had been sent there by his orders; *Leeds* v. *Wright*, 3 B. & P. 320; *Scott* v. *Pettit*, *id.* 469. In the latter case, as well as *Richardson* v. *Goss*, the consignee had no other warehouse; and see *Dixon* v. *Baldwin*, 5 East, 186.

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## The ATTORNEY-GENERAL *against* PARSONS.

King *James* the First granted to Sir *R. T.* the king's manor and

INFORMATION by the *Attorney-General* for intrusion into the royal forest of *Alice Holt* and *Woolmer*, in the county of *Southampton*, in the hands town of *A.*, the king's hundred of *A.*, with its rights and all other things to the said manor and hundred belonging, with a clause that he, his heirs and assigns, should for ever thereafter have free warren and free chase in all their *demesne* lands in the hundred, manor, town, tenements and hereditaments aforesaid, and in all other lands and woods being in the same hundred, manor, &c., although the same *demesne* lands and other lands or woods should lie within the king's forest. There was no recital of any intention to grant a right of free warren *de novo*.—Held, that the word *demesne* only applied to those lands of the manor which the lord, as such, either actually had or might have *propriis manibus*; and therefore that no right of free warren or free chase was conferred over the lands and woods of the crown, within the hundred, manor, &c. but only over the lands, &c. therein, which the grantee had as lord under the description of his demesne lands, and over any tenemental lands which he then held in fee, either of the king or of any lord within the limits mentioned in the grant.

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and possession of the present King *William* the Fourth in right of his crown of *England*, and trampling the herbage, and with dogs, &c. searching for game, and for killing and carrying away therefrom 100 hares, 100 pheasants, and 100 partridges of the King, of great value, &c.

1st plea, as to the entering, intruding, and making ingress on a certain close parcel of the said forest of *Alice Holt* and *Woolmer*, in the information mentioned, &c., and on that occasion trampling, &c., and searching for and killing and carrying away divers, to wit, ten hares, ten pheasants, &c., part of the said hares in the said information mentioned; that the said last-mentioned close in which, &c., at and after the making of the letters-patent hereinafter next mentioned, was and from thence continually hath been and still is parcel of the said forest of *Alice Holt* and *Woolmer*, which is commonly called *Alice Holt Forest*, otherwise *Alice Holt* division, containing divers, to wit, ninety-eight acres, commonly called or known by the name of *Old Close* or *Old Close Farm*, abutting, &c., and in the hundred of *Alton*, in the county of *Southampton*, and that the Lord *James* the First, late King of *England*, at the time of making the letters-patent, hereinafter next mentioned, was seised in his demesne as of fee in right of his crown of *England* of and in the said forest of *Alice Holt* and *Woolmer*, in the said information mentioned, and of and in the said closes in which, &c., in the introductory part of the plea mentioned.

And the said late king being so seised as aforesaid, the said late king, by his letters-patent, sealed, &c., bearing date, &c. 9th *November*, 15 Jas. 1, (profert,) gave and granted, among other things, to *Richard Tichborne*, Knt., his heirs and assigns, for ever, all that the said late king's manor and town of *Alton*, in the said county of *Southampton*, with all their rights,

members, and appurtenances, and all that the said king's hundred of *Alton*, in the said county of *Southampton*, with all its rights, members, and appurtenances, and all those his small rents in the said town of *Alton;* and also all that the manor of *Alton*, and his said late majesty's whole town of *Alton*, in the said county of *Southampton*, with the hundred, and with the small rents in the said town, and all other things to the said manor and hundred belonging; which manor and town of *Alton*, with the hundred aforesaid, and other the premises above by the said letters-patent granted, were, by a particular thereof, mentioned to be in the whole of yearly rent or value of 13*l.* 13*s.* 4*d.*, and to have been formerly parcel of the lands and possessions of *Edmond*, formerly Earl of *Kent*. The said late king also, by the said letters-patent, gave and granted to the said *R. T.* Knt., his heirs and assigns, all and singular his said late majesty's messuages, &c. &c. (see the grant, *post*, 230); and also that they should for ever have free warren and free chase in all their *demesne lands in the hundred, manor, town*, tenements, and hereditaments aforesaid, *and in all other lands and woods in the* (*same*) *hundred, manor, town, tenements, and hereditaments* being. Although the same demesne lands and other lands and woods were or might (thereafter) be within the bounds of the forest of his said late majesty, his heirs or successors, so that no justice, forester, or servant of his said late majesty, his heirs, &c., or any other, should enter the said last-mentioned close in which, &c., to chase in the same, or to take any thing which to warren or chase belonged, or any thing which belonged or might belong to the office of forester, or of any other officer or servant of his said late majesty, his heirs, &c., of the forests or chases of his said late majesty, his heirs, &c., in any manner, without the licence of the said *R. T.* Knt. and his heirs; and his said late Majesty did further, by his said letters-patent,

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grant to the said *R. T.* Knt., his heirs and assigns, the said manor, hundred, messuages, lands, tenements, and hereditaments, and other the premises above by the said letters-patent granted or mentioned to be granted, with all their appurtenances, as fully, freely, and intirely, and in as ample manner and form as all and singular the same premises or any parcel thereof came or ought to come to his said late majesty's hands, or to the hands of any of his said late majesty's progenitors or ancestors, the late Kings or Queens of *England*, by reason or pretext of the dissolution or surrender of any late monastery, abbey, or priory,—or by reason or pretext of any exchange or purchase, or of any gift or grant, —or by reason or pretext of any act or acts of parliament, or of any attainder, forfeiture, or escheat, reversion, or remainder,—or by any other manner, right, or title, and which in his said late majesty's hands then were or ought to be: to have, hold, and enjoy the said manor, town, hundred, messuages, lands, &c. &c., to the said *R. T.* Knt., his heirs and assigns, to the sole and proper use and behoof of the same *R. T.* Knt., his heirs and assigns, for ever, by knight's service, namely, by the service of the fortieth part of one knight's fee, for all other rents, services, exaction, and demands whatsoever to be therefore in anywise rendered, paid, or done to his said late majesty, his heirs and successors. By virtue of which said letters-patent the said *R. T.* Knt. became and was seised in his demesne as of fee and right of and in the said manor, town, hundred, messuages, lands, tenements, hereditaments, and premises, with the appurtenances, and of and in the said free warren and free chase in and over the said close in which, &c.

The title to the above manor, &c., free warren and free chase, was then deduced from Sir *Richard Tichborne* and *Amphillis* his daughter and heiress, who married *Thomas Hyde*, to Lord *Stawell* (the last grantee

of the crown of the rangership of the forest, see *post*), and to Lord *Sherborne*, who married his daughter and heiress, and was seised in her right. The plea then concluded by stating, that Lord *Sherborne* being so seised, defendant as his servant and by his command entered and intruded and made ingress in and upon the said close, in which, &c. as being the free warren and free chase of the said Lord *Sherborne*, and trod down, &c.

There were five other pleas of the same nature, alleging intrusions and trespasses committed on other closes, described therein to be parts of the said forest, and to be within the hundred of *Alton*.

Replications to 1st plea. The first traversed the grant by King *James* to Sir *R. Tichborne* of the close in which, &c., in the introductory part of the 1st plea mentioned.

2d traversed the grant by him to Sir *R. T.* of the hundred of *Alton*, with its rights, members, and appurtenances.

3d traversed like grant of the manor of *Alton*, and the king's whole town of *Alton*, with the hundred and small rents in the same, and all other things to the said manor and hundred belonging.

4th. That the said late king, by his said letters-patent, did not give and grant to the said *R. T.* Knt., his heirs, &c., that they should for ever have free warren and free chase in the said close, in which, &c., and in the introductory part of this plea mentioned, so that no justice, forester, or servant of his said late majesty, his heirs or successors, or any other, should enter the said last-mentioned close, in which, &c., to chase in the same, or to take any thing which to warren or chase belonged, or any thing which belonged or might belong to the office of forester, or of any other officer or servant of his said late majesty, his heirs and successors, of the forests or chases of his late majesty, his heirs, &c.

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in any manner, without the licence of the said *R. T.* Knt. and his heirs, in manner, &c.

5th. That the said late king, by his said letters-patent in the same plea mentioned, did not give and grant to the said *R. T.* Knt. his heirs, &c. that they should for ever have free warren and free chace in the said close in which, &c. in the introductory part of that plea mentioned, in manner and form, &c.

The sixth and seventh replications to the first plea were demurred to by defendant.

8th replication. That the said close, parcel of the said forest in the first plea mentioned in which, &c. at the time of the making of the said letters-patent, was the soil and freehold of the said late king in right of his crown of *England*, and still is the soil and freehold of our present sovereign lord the king in right of his crown of the United Kingdom of *Great Britain* and *Ireland*, and in and upon and over which the said late king at that time had, and our present sovereign lord the king still has, rangers and officers of his forest of *Alice Holt* and *Woolmer*. Without this that the said late king, by his said letters-patent, granted to the said *R. T.* Knt. his heirs and assigns, that they should for ever have free warren and free chace in the said close in which &c. in the introductory part of this plea mentioned. Verification.

Rejoinder to the eighth replication to the first plea. That the said late king, by his said letters-patent, granted to the said *R. T.* Knt. his heirs and assigns, that they should for ever have free warren and free chace in the said close in which &c. in the introductory part of that plea mentioned. Issue thereon.

At the trial at the *Hampshire* assizes a special verdict was found upon the above issues in fact (six in number), finding (in substance) among other things, That the forest of *Alice Holt* and *Woolmer*, from time

immemorial, hath been and still is a royal forest; that the king is seised of it in his demesne as of fee in right of his crown; that at the time of making the grant of King *James* the First, and from thence hitherto, it hath contained within the perambulation thereof 15,493 acres, of which 8693 acres are, and during all that time were, the demesne lands of the kings or queens for the time being, and held and retained by them respectively in their own possession and occupation, and the remaining 6800, during all the times aforesaid, were and still are held in fee simple by divers subjects.

That the whole of the forest, except about 3000 acres, being part of the *Woolmer* division thereof, have been from time immemorial and are within the hundred of *Alton*, in the county of *Southampton*, and that the close in the first plea mentioned, before and at the time of making the grant of King *James* the First was, and from time immemorial hath been and is a close of about 100 acres, parcel of another division of the forest called "The *Alice Holt* Division," within the said hundred, and in the possession and occupation of the several kings, &c. and part of the demesne lands of the crown within the forest, and at the time of the trespass was and still is in the hands, occupation, and possession of the king.

That King *James* the First being seised of the said forest and close, did, on 9th *November*, 15th of his reign, make his certain letters-patent, sealed with the great seal of *England*. (The material parts of these letters-patent are extracted as follows from an exemplification of an inspeximus of the inrolment thereof, made on 20th *December*, 6 *Ann.* and produced at the trial.)

"Know ye that we, &c. have given and granted, and by these presents for us, our heirs and successors, do give and grant to *Richard Tichborne*, Knight, his heirs and assigns, for ever, all that our manor and town of *Aulton*, in our county of *Southampton*, with all their

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rights, members, and appurtenances, and all that our hundred of *Aulton*, in the aforesaid county of *Southampton*, with all its rights, members, and appurtenances, and all those our small rents in the aforesaid town of *Aulton*: And also all that the manor of *Aulton*, and our whole town of *Aulton*, in the aforesaid county of *Southampton*, with the hundred and with the small rents in the same town, and all other things to the said manor and hundred belonging; which manor and town of *Aulton*, with the hundred aforesaid, and other the premises above by these presents granted, are by a particular thereof mentioned to be in the whole of the yearly rent or value of 13*l.* 13*s.* 4*d.*, and to have been formerly parcel of the lands and possessions of *Edmund* formerly Earl of *Kent*, and all and singular our messuages, mills, houses, edifices, buildings, barns, stables, dovecotes, gardens, orchards, garden grounds, lands, tenements, meadows, feedings, pastures, commons, *demesne* lands, glebe lands, wastes, furzes, heaths, moors, marshes, woods, underwoods and trees, and all the land, ground, and soil of the same woods, underwoods and trees; and also the oblations, obventions, fruits, profits, waters, fisheries, fishings, suit, soke, mulcture, warrens, mines, quarries, rents, revenues and services, rents charge, rents seck, and the rents and services as well of free as customary tenants, the works of fee farm tenants, annuities, knights' fees, wards' marriages, escheats, reliefs, heriots, chaces, parks, assarts, purprestures, fines, amerciaments, courts leet, view of frankpledge, court and leet of purchases and profits, and all things to courts leet and view of frankpledge belonging, hundred courts, cattle waived, estrays, natives, male and female, and villains, with the sequels, estovers and common of estovers, fairs, markets, tolls, tollages, customs, rights, jurisdictions, franchises, privileges, profits, commodities, advantages, emoluments and hereditaments whatsoever, of what kind, nature or species they may be, or by whatsoever names they may be known, understood, called or distinguished, situate, lying and being, coming, growing, renewing or increasing within the aforesaid parish and town of *Aulton* or elsewhere within the aforesaid county of *Southampton*, to the aforesaid manor, town, hundred, and other the premises above by these presents granted, or any of them, or any part or parcel thereof in any wise belonging, appertaining, incident, appendant or incumbent, or as member, part or parcel of the aforesaid manor, town, hundred, and other the premises above by these presents granted, or any of them, at any time heretofore had, known, accepted, occupied or reputed, and all our part and purpart of the premises, and every of them; and the reversion, reversions, remainder and remainders whatsoever of the aforesaid manor, town, hundred, lands, tenements and hereditaments, and other the premises above by these presents granted or mentioned to be granted, and of every parcel thereof dependant or expectant, of, in or upon any lease or leases, grant or

grants, gift or gifts, in fee tail or fees tail, or for term or terms for life, lives or years, or otherwise, of the premises by these presents above granted or mentioned to be granted, or of any part or parcel thereof, by any deed being of record or not of record: And also all and singular rents and yearly profits whatsoever reserved upon any lease or leases, grant or grants, gift or gifts, of the premises above by these presents granted or mentioned to be granted, or any part or parcel thereof, in any manner heretofore made, being of record or not of record; and the rents and yearly profits of all and singular the same premises above by these presents granted or mentioned to be granted, and every part thereof; and all writs and suits of partition or portion making, and all writs and suits of scire facias and other suits for the making or having of partition of the premises, or any parcel thereof, to the aforesaid *R. T.* Knt. his heirs and assigns: We by these presents, for us, our heirs and successors, do remise and release by these presents; and also that the said *R. T.* Knt. and his heirs shall for ever have and hold the return of all our writs, precepts, mandates and bills, (and those of) our heirs and successors, and also the summonses, estreats and precepts of our Exchequer and of the Exchequer of our heirs and successors; and the estreats and precepts of our justices (and those of) our heirs and successors in *Eyre*, as well to pleas of the crown, common pleas, and pleas of the forest, and other justices whomsoever, attachments as well of pleas of the crown as of others within the hundred, manor and town aforesaid; and that the aforesaid *R. T.* Knt. his heirs and assigns, by himself and his bailiffs and servants, shall have in the hundred, manor and town aforesaid, all execution and executions whatsoever of the aforesaid writs, precepts, mandates, bills, summonses and estreats, and every of them, and all other things whatsoever which to the office of sheriff within the hundred, manor and town belong, or shall hereafter belong; so that no sheriff, bailiff or other servant of us, our heirs or successors, shall enter the hundred, manor and town aforesaid, or any parcel thereof, to make or execute any distresses, attachments or executions of writs, precepts, mandates, bills, summonses and estreats aforesaid, or any of them, for any office, or any thing touching their office to be done or executed; nor shall thereupon in any manner intrude, unless in default of the aforesaid *R. T.* Knt. and his heirs and assigns and his servants; and also that the said *R. T.* Knt. his heirs and assigns, shall have for ever all and all manner of fines for trespasses, contempts and other faults whatsoever, and fines for licence of according amerciaments, and all redemptions, issues and penalties forfeited, (or) from this time to be forfeited; and all forfeitures whatsoever, year, day, and waste and estrepement, and all things which to us, our heirs and successors, can belong of such year, day, waste, and estrepement, as well of all his men as of all his tenants holding entirely and not

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entirely, resident and not resident, and other residents whomsoever, of and in the hundred, manor and town aforesaid, and all fees to the hundred or manor aforesaid belonging or appertaining, although the same men, tenants or resident tenants, or servants of us, our heirs or successors, in any of our courts, (or those of) our heirs or successors, or tenants resident and not resident, and others resident, may as well before us, our heirs and successors, as before us, our heirs and successors, in our Chancery, (and that of) our heirs and successors, and before our treasurer and barons of our Exchequer, (and that of) our heirs and successors, and before our barons, (and those of) our heirs and successors, of our Exchequer, and also before our heirs and successors justices of the bench, and before the coroner or coroners of us, our heirs and successors; and before the steward, marshal, and clerk of the market of our household, (and that of) our heirs and successors for the time being, or any of them, in any of our courts, (or those of) our heirs and successors, as before the justices in *Eyre*, pleas of the crown, common pleas, and pleas of the forest, justices assigned to take the assizes, deliver gaols, or justices assigned to hear and determine trespasses and felonies, and other our justices, (and those of) our heirs and successors, as well in our presence (as that of) our heirs and successors, to make fines and amerce issues and penalties forfeited, and what shall happen to be adjudged for such year, day, waste and forfeitures: which fines, amerciaments, redemptions, issues and penalties, year, day, waste, estrepement and forfeitures, might belong to us if they had not been granted to the aforesaid *R. T.* Knt. and his heirs and assigns, may levy, take and have for ever, by themselves or by their bailiffs or servants, all and singular the aforesaid amerciaments, redemptions, issues, penalties and forfeitures, and every of them, as well of such men as of such tenants entirely holding and not entirely holding, resident and not resident and elsewhere resident, whomsoever, and every of them; and all things which to us, our heirs and successors, can belong respecting the year, day and waste or estrepement aforesaid, without hindrance or impediment of us, our heirs or successors, justices, escheators, sheriffs, coroners, bailiffs, and other our officers or servants whomsoever, or those of our heirs or successors, although the same men or tenants entirely holding and not entirely holding, resident and not resident, and elsewhere resident, are or shall be officers or servants of us, our heirs and successors, or who else in any manner held of us, our heirs or successors, or of any other persons: And also that they shall for ever have the chattels as well of their own men as of all their tenants, entirely holding and not entirely holding, resident and not resident, and of other residents whomsoever, of and in the hundred, manor and town aforesaid; and all fees of the hundred or manor aforesaid belonging, heretics, lolards, thieves as well great as small, murderers, felons, fugitives, persons con-

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demned, attainted and convicted, and put in exigent, and every of them, although the same shall be men tenants and resident tenants, servants or officers of us, our heirs or successors, so that if any of the men or tenants, resident and not resident, and others of this kind resident, shall for any fault or ill-doing whatsoever of any kind or species, or any of them, ought to lose life or member, or shall flee and will not stand in judgment, or other default be made whatsoever for which he ought to lose his goods and chattels, wheresoever he ought to receive justice, whether in our court or that of our heirs or successors, or in any other of our courts whatsoever, all and singular the same goods and chattels shall be of the aforesaid *R. T.* Knt., his heirs or assigns. And that the same *R. T.* Knt., his heirs and assigns shall have the chattels of felons of every degree of persons condemned or convicted felons of themselves, fugitives, escapes of felons, and all fines whatsoever to be assessed or made in any of our courts or those of our heirs and successors, as well before us, our heirs and successors, as others of our justices, judges and servants, and those of our heirs and successors whomsoever, or any of them. And also the chattels of all persons put in exigent for felony, and also the chattels of fugitives, and waifs whatsoever, and chattels of every kind confiscated, as well of his men, as of all his other tenants entirely holding, and not entirely holding, resident and not resident, and others whomsoever resident within the hundred, manor, and town aforesaid, although the said tenants are not entirely holding of the same *R. T.* Knt., his heirs or assigns, or if the same tenants, or the said men, or the said resident tenants or any of them shall be officers or servants of us, our heirs or successors; and that those goods and chattels are (those of) the aforesaid *R. T.* Knt., (and those of) his heirs and assigns: And that it shall be lawful for the aforesaid *R. T.* Knt., and his heirs or servants, without our impediment or (that of) our heirs or successors, justices, escheators, sheriffs, coroners, or other our bailiffs or servants, or (those of) our heirs or successors whomsoever, to put themselves in seisin of all and singular the goods and chattels aforesaid, and to take, seize, or retain all those things to the use and behoof of the same *R. T.* Knt., and his heirs, notwithstanding all the same goods and chattels should be previously seized by us, our heirs, servants or successors: And also that they for ever within the hundred, manor and town aforesaid, shall have and hold, and may and shall have and hold view of frankpledge, and whatsoever to such view appertains or belongs, or what can hereafter belong to view of frankpledge: And that they shall have all goods and chattels which are named or called waifes and strayes, deodands, treasure trove, and other things or chattels found in the hundred, manor, and town aforesaid: And the goods and chattels called hand labour, taken or to be taken with any person wheresoever within the hundred, manor and town aforesaid, before any judge by the same

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person to be taken notice of: And that the aforesaid *R. T.* Knt., his heirs and assigns, shall have for ever all manner of deodands within the hundred, manor and town aforesaid; and that such goods and chattels called hand labour, deodands, and all which to such deodands belong, shall for ever be to the aforesaid *R. T.* Knt., his heirs and assigns: And that it shall be well lawful for them, of all and singular the aforesaid goods and chattels which are called or named waife and strays, treasure trove, and other things or chattels found, goods and chattels called mannopera and deodands, and of all things to such deodands appertaining, as often and when they shall happen, by themselves or by their bailiffs and servants to put themselves in seisin and possession, and all those things to seize and take, and the same to retain to the use and behoof of the same *R. T.* Knt., his heirs and assigns, without any disturbance, molestation or impediment of us, our heirs or successors, justices, escheators, sheriff, coroners, or other our bailiffs (or those of) our heirs or successors, or of any other person whomsoever, although those things may have been seized by us, our heirs or successors, or any of our bailiffs, officers or servants (or those of) our successors: And that they in the hundred, manor, town, tenements and hereditaments aforesaid, shall have and make by their proper stewards and bailiffs, the assize and assay of bread, wine and ale, and all manner of other victuals, measures and weights whatsoever, and to do and execute all other matters which belong, or can belong to the office of the clerk of the market of our household, and that of our heirs or successors, so often and whensoever it shall be of use and necessity, as fully as if the same clerk of the market of our household and that of our heirs or successors might do or ought to do in the presence of us, our heirs or successors, if the present grant had not been made to the aforesaid *R. T.* and his heirs, and that the same *R. T.* Knt., and his heirs shall have all manner of amerciaments, fines, and other profits thereupon arising, to be received and levied by themselves, and their servants without the hindrance of us, our heirs or successors, clerk of the market, or other servants of us, our heirs or successors whomsoever, so that the aforesaid clerk of the market of our household (or that of) our heirs or successors, shall not enter the hundred, manor or town, tenements, or hereditaments aforesaid, or to do or execute any thing there which to his office belongs, or can hereafter in anywise belong. And we have further granted, and by these presents do grant for ourselves, our heirs and successors, to the aforesaid *R. T.* Knt., his heirs and assigns, *that they shall for ever hereafter have free warren and free chace in all their demesne lands in the hundred, manor, town, tenements and hereditaments aforesaid, and in all other lands and woods in the (same) hundred, manor, town, tenements and hereditaments being, although the same demesne lands and other lands and woods are, or may be, within the bounds of*

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*our forests (or those of) our heirs or successors*, so that no justice, forester, or servant of us, our heirs or successors, or any other person, shall enter the hundred, manor, town, demesne lands or other lands, woods, tenements, or hereditaments, to chase in them, or to take any thing which to warren and chase belongs, or any thing which belongs or may belong to the office of forester, or of any other officer or servants of us, our heirs and successors, foresters or chasers of us, our heirs or successors, in any manner, without the license of the aforesaid *R. T.* Knt., and his heirs &c. And that the aforesaid *R. T.* Knt., his heirs and assigns, shall for ever hereafter have, hold, and enjoy, and shall have in their power to have, hold, and enjoy, within the aforesaid manor, town, hundred, messuages, lands, tenements, and hereditaments, and all and singular other the premises above by these presents granted or mentioned to be granted, and within every parcel thereof, so many, such like, the same, of such kind, and similar courts leet, view of frankpledge, hundred courts, lawdays, assize and assay of bread, wine and ale, cattle, waifed, estrays, chattels of felons and fugitives, felons of themselves, and put in exigent, knights' fees, wards' marriages, escheats, reliefs, heriots, *free warrens*, *free chases*, fairs, markets, and all other rights, jurisdictions, franchises, liberties, customs, privileges, profits, commodities, advantages, emoluments, and hereditaments, whatsoever, how many, such, and which, and so fully, freely and entirely, and in as ample mode and form as the aforesaid *Edmund* formerly Earl of *Kent*, or any other or others, heretofore having, possessing or being seised of the aforesaid manor, town, hundred, messuages, lands, tenements, and hereditaments, and other the premises above by these presents granted, or mentioned to be granted, or any part or parcel thereof, with all their appurtenances, ever had, used, or enjoyed, or ought to have, use or enjoy, in the premises above by these presents granted, mentioned to be granted, or in any parcel thereof, by reason or pretence of any charter, gift, grant, or confirmation by us, or by any of our progenitors or ancestors, late kings or queens of England, heretofore had, made, granted or confirmed, or by reason or pretence of any act of parliament, or any acts of parliament, or by reason or pretence of any legal prescription, use, or custom, heretofore had or used, or otherwise by any lawful means, right or title, and so fully, freely and entirely, and in such ample manner and form as we, or any of our progenitors or ancestors, late kings or queens of England, the aforesaid manor, town, hundred, messuages, lands, tenements and hereditaments, above by these presents (granted) or mentioned to be granted, or any parcel thereof, have had and enjoyed, or ought to have and enjoy.

The king also for further assurance extinction and bar of all manner of estate &c. in the said manor, hundred, and town, and

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of every remainder and reversion therein to him appertaining, covenanted and granted to the said Sir *R. T.*, his heirs and assigns, that within a year from the date of the letters-patent a fine sur done grant et render should be levied, by which the king should render the same manor &c. to Sir *R. T.*, his heirs and assigns for ever."

The special verdict found that King *James* the First, at the time of making the said letters-patent, was seised in his demesne, as of fee in right of his crown, of the premises expressed to be granted thereby: That Sir *R. Tichborne* in the grant, was identical with *R. T.* in the plea; and that the hundred of *Alton* then contained nineteen parishes, part whereof being out of the perambulation of the forest, was proved to have been at the time of the grant, and still to be, in the hands of a subject.

That the said Sir *R. T.* and the persons stated in the plea to have been successively seised of the said manor of *Alton*, were so seised as in the plea: That Lord *Sherborne* at the time of the tresspasses was, and is, seised for life of the manor: That during this seisin of the manor by the above Sir *R. T.* and his above mentioned heirs and assigns, they held court leets for the hundred of *Alton*, and received *certum letæ*: That fines and common recoveries of lands &c. holden of the said manor have been suffered at such courts.

That a justice seat for the forest was duly held at *Brinstead*, on 20 *August*, 11 *Car.* 1. for and on behalf of the same king, before &c., at which court of justice seat the usual notice was given, requiring all persons claiming to have by charter from the same king, or any of his ancestors or predecessors, or by any other means, any liberties, franchises, issues &c. and privileges, or other free customs within the said forest, to attend at such court.

That at such court so held, divers claimants of liberties &c. within the forest attended and preferred their

claims, but no claim was made there by or on behalf of *Amphillis Hyde* in the first plea named, who with her husband, *Thomas Hyde*, were at that time seised in their demesne as of fee, in right of the said *Amphillis*, of the premises in the said letters-patent granted to *R. T.*, nor by or on behalf of any other person claiming under such letters patent any right of free warren or free chase, or any other matter or thing whatsoever within any part of the said forest.

That from time immemorial there have been, and still are kept within the forest for the several kings and queens for the time being, deer and game, which have fed and remained over in and upon the close &c.; and that there has always been, and still is, within the forest, an officer of the king's &c. for the time being, called the lieutenant or warden of the forest, and foresters and keepers, their duty being to preserve and watch, and when required, to kill for the said kings &c. the said deer and game, and that they accordingly have preserved &c. and killed, and still do preserve &c. and kill the same within the said close.

That long before the making of the said letters-patent by King *James* the First, Queen *Elizabeth* was seised &c. of the forest, and being so seised on 14 *January*, in the 45th of her reign, by letters-patent under the great seal granted to Sir *W. Knollys* the office of lieutenant and warden of the forest and chase of *Alice Holt* and *Woolmer*.

That Sir *W. Knollys*, by that grant, became seised of the office of Lieutenant or Warden of the same forest, as of freehold for life, and became and was entitled to have, hold, enjoy, exercise and occupy the same with all the offices, liberties, privileges, wages, fees, rewards, and other profits and commodities thereby granted for life: That he accordingly entered into and

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possessed and enjoyed &c. the same till 1 *August* 1 *Car.* 1. when he surrendered the letters-patent of *Elizabeth* into the chancery to be cancelled: That King *Charles* the First, on 1 *August* in the first year of his reign granted his letters-patent sealed with the great seal, whereby, after reciting the said grant so made to the said Sir *W. Knollys*, and also a grant bearing date 21 *March* 20 *James* the First, of the reversion of the manor of *Wordilham* to *G. S.* and *J. W.* and their heirs, rendering the yearly rent of 31*l.* 12*s.* 11*d.* and also reciting the above surrender of the grant of *Elizabeth* by Viscount *Wallingford*, the said king did give and grant to the said viscount and *E. R.* for their lives and the life of the survivor, the said rent of 31*l.* 12*s.* 11*d.* so reserved by the said grant, to *G. S.* and *J. W.* with the intent that they should yearly pay and support all the fees, wages, salaries and stipends of all the foresters and ministers of forests and chases thereinafter specified during their lives and the life of the survivor; and the said king did thereby grant to the said viscount and *E. R.* the office of lieutenant or warden of the said forests and chases of *Alice Holt* and *Woolmer*, and all and singular offices, wages, liberties, fees, commodities and privileges whatsoever to the said office appertaining, and did thereby constitute them lieutenant or warden of the forests and chases aforesaid, and each of them, with power to appoint deputies and foresters &c. and also granted to them all attachments of whatsoever animals to be attached within the forests and chases aforesaid, and all manner of wood thrown down by the wind and dead wood, and also the branches and boughs of trees and woods, cut or felled, within the same, and housebote and firebote for themselves and their foresters and keepers aforesaid to be taken within the same, and also waif, stray, honey and wax found therein, and

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separate pasture within the lands of his said majesty his heirs &c. in the forests aforesaid, for two horses of them, the said viscount and *E. R.*, and their deputies aforesaid, and sufficient pasture to be taken therein for one horse of every forester and keeper aforesaid, and free liberty of fishing within the waters in the said forests and of retaining the fish caught to their own uses. The king also granted power to hold in every sixth week a court called a wood court, and granted them all fines and amerciaments to be forfeited to himself therein, and all and singular the bowels or entrails commonly called the nombles and also the suets of all deer killed or taken within the said forests, with liberty to each of them to take a buck and doe in the summer of each year, in the winter a brocket and a pricket to their own uses, and to have, hold, exercise and occupy all and singular the offices, authorities, privileges and liberties aforesaid, and also to have, exercise and return all and singular the profits, advantages, commodities and other the premises to the aforesaid viscount and *E. R.* for and during the term of their lives and the life of the longer liver of them without account &c. *to* the king his heirs &c.

The last mentioned letters-patent were afterwards surrendered to *Charles* the First, and the said office and rent were afterwards granted by him to Sir *C. Clarke* Knt., and *Robert Tyrwhitt* Esq., for their lives and the life of the survivor for the like purposes. A series of similar grants of this office and rent by successive sovereigns for lives or years were found by the jury to have existed between the above period and 23 *March* 1811, when the last grant expired.

On 26 *June*, 52 G. 3, (1812) King *George* the Third granted to Lord *Stawell*, and his assigns, the office of *ranger* of the forests or chase of *Alice Holt* and *Woolmer*, with all and singular the sole and exclusive liberties

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and privileges of hunting, hawking and fowling within, upon and over the said forest or chase; and also of fishing within the ponds and streams situate and being therein, and with full power at his will and pleasure, and at his expense to depute so many keepers for preserving the said liberties and privileges as should and might become necessary for those purposes. To have and to hold the said office and privileges to Lord *Stawell*, and his assigns, from 3 *April* 1811, for 31 years if he should so long live. Covenant by Lord *Stawell* to relinquish any claim to the deer then remaining on the said forest or chase without prejudice to any such rights as he and his assigns might be legally entitled to under the grant and devise to him of free warren over the hundred of *Alton*, *Westbrook*, and manor of *Alton*, (see the plea).

Lord *Stawell* became and was possessed of the office of ranger under the grant for the term therein mentioned, till his death on 25 *August* 1820. He, as well as his immediate predecessors, *H. B. Legge*, and his mother, Lady *S.* afterwards Countess of *Hillsborough*, during the time that they were respectively seised of the manor of *Alton* in the first plea mentioned, appointed gamekeepers yearly to shoot for them upon the said manor. Lord *S.* in 1778, by leave of Lady *S.*, and down to his death, sported over the close in the first plea mentioned, and over other lands within the forest, in the season, and killed hares, partridges and pheasants there, converting them to his own use.

The arguments took place in last *Michaelmas* Term.

*R. Bayly* for the crown. The grant of free warren or free chase by *James* the First to Sir *R. Tichborne* is void and ineffectual as to any lands not belonging to the grantee. First, for nonrecital (*a*) of the previous

(*a*) See the authorities in *Coke*'s Reports, new edit. collected in *Tyrwhitt*'s Index, tit. *King's Grant*, p. 170.

grant by Queen *Elizabeth* of the lieutenancy and rangership of the whole forest to Sir *W. Knollys*, requiring him to preserve the deer and game for the crown, and giving him four deer in the year with the nombles and suets of all deer killed in the forest. Such deer if hart or hind were beasts of forest, if buck or doe were beasts of chase. *Com. Dig.* tit. Chase, A. E.; so that the latter grant being inconsistent with the former is void as in deceit of the king. The words of the grant of the hundred of *Alton*, "with all other things to the hundred belonging" do not pass the grantor's lands within or part of it, but the franchise only. *Bays* v. *Bird* (*a*), nor since stats. *2 Ed.* 3. c. 12. 14 *Ed.* 3. c. 9. can the crown grant a hundred. *Cole* v. *Ireland* (*b*), *Doxley* v. *Foxley* (*c*), *Rex* v. *Kingsmill* (*d*).

Secondly, The grant is void, because the king cannot grant free warren or free chase over a manor or hundred containing the lands of subjects. Here 3000 acres are found to belong to subjects within the hundred of *A.* [*Bayley* B. The king can only grant free warren in his own or the grantee's lands. Perhaps we may look to usage as well as the words of the deed, in order to discover the king's intent as to his own lands. It may be that this grant passes free warren in the king's and the grantee's lands, and not elsewhere. Lord *Lyndhurst*, C. B. The question is, whether the words "all other lands and woods" extend to crown lands not expressly mentioned?]

In 1750, Mr. *Legge*, ancestor of Lord *Sherborne*, became lieutenant (or ranger) of the forest, and as such, it became his duty to preserve the deer and game for the king, as his servant; nor was it till 1752, when he acquired the lands formerly belonging to Sir *R.*

(*a*) 2 P. Wms. 400.
(*b*) 2 Jones, 194; T. Ray. 360.
(*c*) 1 Roll. R. 119.
(*d*) 4 Inst. 267; 3 Mod. 199.

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*Tichborne*, that the rights under both grants became united in one person. Lord *Stowell* was the first ranger, who having as such the right to appoint all foresters, took game to his own use in violation of the king's rights. Then in order to make the grant of free warren consist with the facts of the unvaried exercise by the king of forestal rights and appointment of officers of the forest over the *locus in quo*, without leave of Sir *R. Tichborne* or his heirs, a limited construction and effect must be given to it; thus, the words "in all other lands and woods" can only apply to his lands and woods; for at the time of the grant, several other subjects held lands in the hundred, nor did his heirs claim under it at the justice seat held in the reign of *Car.* 1.

That the grant of *James* was ineffectual and void as to crown lands is also shown by the long non user of the rights of free warren and chase which it assumes to confer, contrasted with the king's exclusive user from time immemorial of rights wholly inconsistent with such a grant, *e. g.* the preservation of deer and game, and appointment of foresters and verderors. The mere production of the grant of *James* avails nothing without evidence of user of the franchises granted, and rather tends to show that in a cotemporaneous period some obstacle (probably the previous grant of *Elizabeth*) prevented the user. *Chad* v. *Tilsed* (*a*).

*Manning* for defendant. The grant of *James* shows in the outset that this hundred, manor, and premises, were formerly possessed by *Edmund* Earl of *Kent* (*b*). By the latter part the grantee, who has liberty to hold courts leet with other franchises, is to have and enjoy free warrens and free chases in as ample a manner as they were ever used or enjoyed, &c. by the Earl of

(*a*) 2 Br. & B. 403. 408, 9.

(*b*) Brother to *Edward* 2. Attainted and executed, 4 *Ed.* 3. 1329.

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*Kent.* Among the matters granted are the fees of heretics and lollards; and courts leet were held 10 *Jac.* 1. before the grant, from which it would seem that franchises which had before existed in the hands of a subject had been then regranted.

[*Bayley* B. How is it shown that the Earl of *Kent* was seised of free warren in the *locus in quo?* The plea does not allege that free warren existed there at the time of the grant by *James* the First.]

The grant of forest includes free warren and free chase.

[*Bayley* B. Unless the free warren was held and exercised exclusively of forestal rights, it would not be presumed from the general words of the grant. *Carr* v. *Smith* (*a*). Lord *Lyndhurst* C. B. Different descriptions of land exist so as to satisfy all the words of the grant, and demesnes are distinguished from tenemental

(*a*) MS. K. B. M. T. 1812. Trespass for hunting in plaintiff's close. Plea, justifying as deputy of *J. F. C.* under a grant by the king of the office of gamekeeper of the forest of *B.* in which the king was seised in right of his duchy of *Lancaster*, and whereof the close in question was part. Replication, stating that *James* 1, being seised of certain vacarries, whereof the close in question was parcel, and of free warren within the same, granted the vacarries and free warren to *J. S.*, under whom plaintiff claimed title. Rejoinder, denying the grant.

A special case set out a grant by *James* the First to *J. S.* of certain manors and the vacarries in question, and all woods and trees, in general words, after the description of the premises "warrens;" and in another part, all courts leet and waifs and hereditaments "free warrens" and all other rights, &c. as freely as the king or his predecessors had or ought to have enjoyed them on the premises granted, or as any former predecessors had enjoyed them.

After argument, the court were of opinion that inasmuch as it did not appear that at the time of the grant the *locus in quo* was applied to purposes of warren, or that any distinct right of free warren independent of the general forest right was then subsisting on it, and as the grant contained no words showing an intention in the Crown to create such right and pass it *de novo*, the grant did not pass such right; and the postea was delivered to defendant.

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lands, *i. e.* lands and woods. Then do not the words "demesne lands" apply to all the lands, distinguished from those described as "other lands and woods?"

The first branch of the grant exhausts the demesne lands of which the grantee was seised in fee. The second expressly gives free warren in all other lands, viz. of strangers or the crown, in which the grantee had no interest, as well as in lands held of the manor of *A.*, in which he had an interest, without seisin in demesne.

[*Bayley* B. Sir *R. Tichborne* might have demesne lands and other lands in the hundred or manor, which were not demesnes of the manor or the crown, *e. g.* purchased from third persons, or formerly alienated by the lord and repurchased.]

The word "demesnes" would embrace all lands of the grantee not held in *servitio*, viz. by freeholders. *Bracton*, 263 (*a*), *Fowler* v. *Segrave* (*b*), *Heigham* v. *Best* (*c*).

The ordinary grant of free warren is more restricted, viz. to be exercised in the demesne lands of the grantee, provided they are not within the bounds of any forest (*22 Vin.* 421.) In this case, the grant is in more extended terms *ex gratiâ speciali* to the grantee (*d*) or because similar rights had existed at an earlier period over the same lands. The words *ex gratiâ speciali* imply knowledge by the king of the preceding facts. *Plowden*, fol. 331, *Case of Mines*. The second branch

(*a*) Et sciendum quòd dominicum dicitur, ad differentiam ejus quòd tenetur in servitio: et unde dicitur totâ die, quòd videndum erit quid quis teneat in dominico et quid in servitio. Et regulariter verum est, quòd dominicum dici potest, omne illud tenementum de quo antecessor obiit seisitus ut de feodo: sive cum usu fructu, vel sine: et de quo si ejectus esset dum viveret, recuperare posset per assisam novæ disseisinæ.

(*b*) 2 Bulstr. 254.

(*c*) Cro. El. 462.

(*d*) It was stated that Sir *R. Tichborne* had proclaimed *James* at *Winchester* before receiving orders from the Privy Council.

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of the grant, though couched in specific terms, would be altogether inoperative, if it did not include all other lands within the district over which the crown had a right to grant free warren. In *Plowden*, 336, 337, *Dyer* C. J. says, "If the king being possessed of a mine royal in the soil of *J. S. ex gratiâ speciali certâ scientiâ et mero motu* grants to a stranger all the mines he has in the land of *J. S.*, by that grant a mine royal will pass, for otherwise the words will be void and without effect, for the king cannot have a base mine in the soil of another, and inasmuch as he said *ex certa scientia*, &c. and recites that it is in the soil of another, he shall not be taken to be misconusant of the matters, *Carr* v. *Smith* only shows that general words do not pass free warren unless a clear intent to do so appears, but *Evans* v. *Ascough* (*a*) shows that the intent and not the precise words of the king's grant are to be regarded, and that by the king's grant of a "church" not only the actual seisin of the parson *imparsonee* passes, but the advowson also.

The grant of *Elizabeth* only created an office without conveying an estate, and might exist concurrently with the grant of *James*. For under the first, the ranger had custody of the beasts of forest, viz. hart, hind, boar, wolf, and hare, and the nombles and suets only apply to red deer, A grant of free warren applies to conies, pheasants, partridges and hares (*b*). Thus the ranger might kill hares for the crown in the forest and in the free warren for his own use.

User of the right of free warren over this small spot cannot be proved, because the office of ranger and right of free warren have for 80 years been united in the same person. But the act of Lord *Stawell* since that union must be referred to a lawful origin, viz. the right of free warren, and not to a tort or breach of his duty

(*a*) Latch. 248. (*b*) Com. Dig. Chase, E. F.

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as ranger; but user need not be shown, for non-user of parks, warrens or such like, is no ground of loss or forfeiture. *Leicester Forest case* (*a*).

[*Bayley* B. That rule applies where a free warren is first shown clearly to have existed by grant or prescription.]

The king may grant a forest, and that grantee and his heirs shall be justices of the forest; but a grant of a forest with the game, but without the latter words, enures as a free chase, and is not inoperative. 3 *Inst.* 314; *Co Litt.* 233, a. This grant is not of a hundred, but is only coupled with it. *Year Book*, 44 *Ed.* 3, 12, pl. 20 (*b*), 3 *H.* 6, fol. 13, pl. 15 (*c*).

*R. Bayly* replied. A manor must be time out of mind, and cannot be created by the king at this day or since the statute of quia emptores. *Marsh* v. *Smith* (*d*). So, if any part of the demesnes are granted away, they are severed from the manor and can never again really become parcel of it. *Lemon* v. *Blackwell* (*e*), *The Queen* v. *The Duchess of Buccleugh* (*f*).

Lord LYNDHURST C. B., now delivered the judgment of the court as follows:—

(*a*) Cro. Jac. 155.

(*b*) *S. C.* 22 *Vin. Abr.* tit. *Warren* (H); Fitzh. Abr. Bar. fol. 47, pl. 198. Trespass for hunting in plaintiff's warren. Defendant pleaded that at the time when, &c. he was and still is seised of the *locus in quo* by descent of inheritance, wherefore he hunted there. Without this that he hunted on the plaintiff's land. *Fynchden* (C. J. of C. P.) It is a good plea to a common intent, for if you have a warren by the king's grant, such a grant operates in demesne lands, and if you have warren by prescription as well in the lands of others as in your demesne lands, that ought to be alleged.

(*c*) See per *Martin*, a judge of C. P., but see 22 Vin. Abr. 490, citing Brook. Ab. tit. Warren, contrà.

(*d*) 1 Leonard, 26.

(*e*) Skin. R, 192.

(*f*) 6 Mod. 151.

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This case came before the court upon a special verdict, and the material question was, whether, under the letters-patent from King *James* the 1st (15 *Jac.* 1) to *Sir R. T.*, a right of free warren passed within the limits to which that grant extends, on what then were, and ever since have been, and still are, the lands of the crown. If no such right passed, the defendants have no ground of defence, and the plaintiff is entitled to the judgment of the court. It is not found by the special verdict that there was any right of free warren over the land in question in existence at the time of the grant by King *James* (except as far as the crown by its prerogative may be considered as having such a right), and therefore it must be taken that at that time there was no such right. The letters-patent of King *James* contain no recital, but grant unto Sir *R. T.* and his heirs, all that our manor and town of *Alton* (county of *Southampton*) with all their rights, &c., and all that our hundred of *Alton*, with its rights, and all our small rents in the aforesaid town, and all other things to the said manor and hundred belonging, which manor and town, with the hundred, &c., are by the particulars thereof mentioned to be of the yearly value of 13*l.* 13*s.* 4*d.*, and to have been formerly parcel of the possessions of *Edmund*, Earl of *Kent*. The letters-patent also granted to Sir *R. T.* and his heirs, all his, the king's messuages, mills, houses, &c., lands, tenements, &c., services, &c., view of frank-pledge, profits of courts, &c., to view of frank-pledge belonging, &c., franchises, &c., within the parish and town of *Alton*, or elsewhere in the county of *Southampton*, to the aforesaid manor, town, hundred, and other the premises thereby granted or to any of them belonging or appertaining. The letters-patent also granted all the king's reversion and remainder in the manor, town, hundred, &c., and all rents. They also grant unto Sir

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*R. T.* and his heirs, the return of writs, and all fines and amerciaments, goods of felons, &c., and view of frankpledge within the hundred, manor, and town aforesaid; [and the assaying of bread, wine, and ale, and all other victuals within the hundred, manor, town, and tenements aforesaid.] Then comes the clause upon which the present question arises—"And further, we do grant to Sir *R. T.*, his heirs and assigns, that they shall for ever hereafter have free warren and free chase *in all their demesne lands in the hundred, manor*, town, tenements, and hereditaments aforesaid, *and in all other lands and woods being in the same hundred, manor, town, tenements, and hereditaments;* although the same demesne lands and other lands and woods be within the bounds of our forests, so that no justice, forester, or officer of us, our heirs or successors, shall enter the hundred, manor, town, demesne lands, or other lands, woods, tenements, or hereditaments, to chase therein, or to take any thing which to warren or chase belongs, or any thing which belongs to the office of forester, &c., or other officer, without the leave of Sir *R. T.* and his heirs."

The letters-patent then grant certain immunities to Sir *R. T.*, and provide that he and his heirs shall have and enjoy the aforesaid manor, town, hundred, &c., and, among other general words, *free warrens* and *free chases*, &c., in as ample mode and form as the aforesaid *Edmund*, Earl of *Kent*, or any others having or possessing the aforesaid manor, town, hundred, &c., and other the premises above granted, had or enjoyed the same, and as fully as the king or any of his progenitors ought to have had or enjoyed the same. They also contain a grant by the king for a fine *sur done, grant, et render.*

No other parts of the letters-patent appear to bear upon the point in issue; and the question therefore is,

whether such a grant as this shall in the king's case, where there is no recital of any intent to make a grant *de novo* of free warren over any lands, no recital of any intention to create such a burthen upon the king's own lands, where the words used do not necessarily imply an intention to create such a burthen, and where the provision for enjoying as freely as former possessors had enjoyed, and for levying a fine, rather imply an intention to grant only what had before been enjoyed, have the effect of giving the grantee a right of free warren over the king's own land.

A grant of free warren is in general confined to the lands of the grantee; the king cannot grant it over the lands of a third person; and though he might grant it over his, the king's, own lands, we are not aware of any instance in which it has been done. And, unless the words were such as to show unequivocally that such was the intention, we think they would not have that effect (*a*).

The rules of construction upon grants from the crown are much more favourable to the grantor than the rules of construction upon grants from ordinary persons. This is established by the case of the river *Banne*, in Sir *J. Davis*'s reports (*b*), where it was adjudged that a grant of, among other things, all fisheries, would not pass a royal fishery, such as the crown had by prerogative in the navigable part of a river, where the tide ebbs and flows; and that an exception of three-fourths of the fishery to the crown would not make the other fourth pass by the grant, because the king's grant shall pass nothing by implication; and *Plowden* (*c*) lays it down, that words used by the king, which contain things royal and things of

(*a*) See 3 Co. 9 b; Sav. 70; 9 Co. 29 b; 10 Co. 63 a, 113 b; Dav. 55; Plow. 333, 334.

(*b*) Davis, 57.

(*c*) Page 333.

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a base nature, shall, in favour of the king, be taken in such sense as serves best for the king, and as is agreeable with order and convenience, for, when the words stand indifferently, and may be construed one way or other, that which is most convenient shall be taken. And it is most convenient that things appropriated to the crown and to the prerogative royal should tarry with the crown, and not be severed from it without *special words;* and that words in patents to subjects shall make such things to pass as are proper for and suitable to subjects. And for this, among other reasons, a grant by the king of all and singular mines within certain lands, was held to pass base mines only, such as copper, lead, &c., not mines royal, of gold and silver.

In the case now before the Court, the letters-patent grant the king's manor and town of *Alton*, the king's hundred of *Alton*, with its rights, and all other things to the said manor and hundred belonging; and also grants, that Sir *R. T.*, his heirs and assigns, should for ever thereafter have free warren and free chase in all their demesne lands in the hundred, manor, town, tenements, and hereditaments aforesaid, and in all other lands and woods being in the same hundred, manor, town, tenements, and hereditaments, although the same demesne lands, and other lands or woods, be within the king's forest; so that none of the king's officers should enter the hundred, manor, town, demesne lands, or other lands, woods, tenements, or hereditaments, to chase therein, &c., without license from Sir *R. T.*, his heirs or assigns.

What, then, is the effect of the grant of free warren within their demesne land? And what the effect of the grant in all other lands and woods in the hundred manor, town, tenements, and hereditaments?

It was pressed in the argument, that all their

demesne lands meant all the lands within the hundred, &c., of which Sir *R. T.* was seised in fee; and that, then, the other lands and woods would of necessity mean the lands and woods of the crown, because the king could not grant free warren or free chase *de novo* over the lands of a third person. Let us see, then, whether we are at liberty to say that this is the sense in which the words "demesne lands" are used in this charter; for, if we are not, the other lands and woods will not mean, of necessity, the lands and woods *of the crown*, but will be satisfied by being applied to other lands of Sir *R. T.*, within the limits.

*Bracton* (*a*) treats of the question, "Quid sit dominicum," and considers it as having various meanings. "Item, dominicum accipitur multipliciter. Est autem dominicum quod quis habet ad mensam suam et propriè, sicut sunt *bordlandes* Anglice. Item, dicitur dominicum villenagium quod traditur villanis, quod quis tempestivè et intempestivè resumere possit pro voluntate suâ et revocare. Item, potest dici dominicum de quo quis habet liberum tenementum, et alius usum fructum. Item, dici poterit dominicum de quo quis habet liberum tenementum, et alius custodiam. Eodem modo dici poterit dominicum, de quo quis habet liberum tenementum et alius curam; sicut dicitur de custode et curatore, et unde unus datur a jure, et alius ab homine. Et generaliter qualitercunque quis feoffatus fuerit in quâcunque horâ, in feodo sibi et hæredibus suis, vel si ex causâ successionis, ita quod assisam novæ disseysinæ habere posset si ejectus esset dum viveret, competit hæredibus suis assisa mortis antecessoris post mortem suam si seysitus moriatur. Et sciendum quod dominicum dicitur, ad differentiam ejus quod tenetur in servitio, et unde dicitur totâ die, quod videndum erit

(*a*) Lib. 4, tr. 3, c. 9, s. 5, fol. 263 a.

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quid quis teneat in dominico, et quid in servitio. Et regulariter verum est, quod dominicum dici potest, omne illud tenementum de quo antecessor obiit seysitus ut de feodo, sive cum usufructu vel sine, et de quo si ejectus esset dum viveret, recuperare posset per assisam novæ disseysinæ licet alius inde haberet usumfructum, et unde ad declarationem seysinæ antecessoris statim competit hæredi assisa mortis antecessoris si impeditus fuerit, ut seysinam habeat de tenemento sicut antecessor suus habuerit, et quod ad hæredem recognoscatur, salvo firmario termino suo, &c. &c. Item, unus tenere poterit in feodo quoad servitium, sicut dominus capitalis et non in dominico, et alius in feodo et in dominico et non in servitio, sicut libere tenens alicujus, &c., &c." *Bracton*, therefore, speaks of the word (demesne) *dominicum*, as applying—*first*, to what a man has in his own hands, for his own table and support;—*secondly*, to what he has in the hands of his villein;—and, afterwards, more extensively, to whatever he holds in fee.

*Fleta*, which was written about a century after *Bracton*, (that is, 1340), seems to have had *Bracton* in view, and to have corrected him (*a*):—" Dominicum autem multipliciter accipitur. Est autem dominicum propriè terra ad mensam assignata, et villenagium quod traditur villanis ad excolendum, et terra precariè dimissa quæ tempestivè et pro voluntate domini poterit revocari, et sicut est de terrâ commissâ tenendâ quamdiu commissori placuerit. S. 19—Poterit etiam dici dominicum de quo quis habet liberum tenementum, et alius usumfructum," (curam, &c., as in *Bracton*). S. 20—" Dominicum etiam dicitur ad differentiam ejus quod tenetur et in servitio. Dominicum est omne illud tenementum de quo antecessor obiit seisitus ut de feodo, &c."

*Spelman*, besides referring to the passage from

(*a*) Lib. 5. c. 5. s. 18.

*Bracton*, says, "*Dominicum* etiam vox forensis est et multiplex, Gallis *domanium*, Italis *demanium*, Anglis the *demaine*, quod nonnulli perperam scribunt *demeane* et *demesne*, ac si a Gal. *de mesne*," that is, "sui ipsius proprium, non a Latino *dominico* nasceretur. Dominicum dicitur patrimonium domini, atque idem quod dominium. Nostri vero forenses recentiores solummodo pene utuntur, vel ad significandam fundi proprietatem, vel manerii partem, hoc est, terras et prædia quæ dominus hæreditariè non tradit suis tenentibus, sed aut suipsius manibus retinuit, aut ad annos aliquot, sive voluntatem elocavit. Vulgo, terræ dominicales, *demaine landes*." *Ducunge*, in his Glossarie, thus explains dominicum:—"Dominicum—proprietas domanium, quod ad dominium spectat, quo dominus ad propriam alendam familiam fruitur. Unde, Anglis dominicum definitur quod quis habet ad mensam, sicut sunt prædia quæ *bordlandes* iidem vocant;" and he refers to the passages from *Bracton* and *Fleta*. He also refers to *Cowell*—"Dominicum est tota illa terra intra manerium quod dominus feudi, aut in manibus suis retinet, aut saltem ad annos, aut voluntatem suam juxta consuetudinem manerii, aliis locat." Lord *Coke* says (*a*)—"Dominicum is not only that inheritance wherein a man hath proper dominion or ownership, as it is distinguished from the lands to which another *doth hold of him in service*, but that which is manually occupied, manured, and possessed, for the necessary sustentation, maintenance, and supportation of the lord and his household, and savoureth *de domo*, of the house, either *ad mensam*, for his or their board and sustentation, or is manually received (as rents) for bearing or defraying of necessary charges, public or private. Of these, says our author, he should plead,

(*a*) Co. Lit. 17

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that he is seised *in dominico suo ut de feodo*, i. e. *de feodo dominicali, seu terrâ dominicali seu redditu dominicali*, which is as much as to say, *demeyne* or *demaine*, of the hand, *i. e.* manured by the hand, or received by the hand; and therefore he calleth it *manual* occupation, possession, or receipt. And in *Domesday*, demesne land is called inland, as, for example, 4 *bovotas terræ de* inland, *et* 10 *boratas in servitio.*" In this passage it is obvious, that, when he speaks of that wherein a man hath proper dominion or ownership, he is speaking of what he holds as lord, not of what he may hold of another lord, and therefore holds *in servitio;* for he speaks of such land as distinguished from what another holds of him *in servitio*, (and, unless he were lord, no one could hold of him); he speaks of what he keeps in hand, as kept for the necessary support of the "lord" (that is, himself) and his household; and, in speaking of the demesnes as *inland*, he puts in opposition to them what is *in servitio*. In his *Complete Copyholder*, Lord *Coke* applies the same term "inland" to demesnes, and gives such an explanation of the word "demesnes" as seems to show clearly that it cannot admit of the large construction for which the defendant here contends—that is, "all the lands within the hundred," &c., of which Sir *R. T.* was seised in fee—but that it was to be confined to *what were within his manor, and whereof he was lord*. The *Saxons*, he says (*a*), had manors in substance nothing differing from ours; they wanted neither demesnes nor services. Their demesnes they termed *inlands*, because the lords kept them in their own hands, and enjoyed them in their own possession. Their services they termed *utlands*, because those were in the manurance and occupation of certain tenants, &c. &c. In sec. 11, he gives a

(*a*) Section 2.

distinct explanation of the word demesne. "Demesne," he says, "termed in Latin, *demanium*, *domanium*, or *dominicum*, is taken in a double sense, *proprie et improprie; proprie*, for that land which is in the king's own hands—*domanium est illud quod consecratum, unitum, et incorporatum est regiæ coronæ.* Take *domanium* in this sense," he says, "and then you exclude all common persons from being seised *in dominico;* for admit the king pass over (that is, grant away) the demesne lands, as soon as they come into a common person's hands, *desinunt esse terræ dominicales;* for though the king's patentee hath the land granted to him and to his heirs, yet coming from the king, it must necessarily be holden of the king; but it is contrary to the nature of demesne lands to be holden of any." S. 12—"Then by this it appeareth, that those lands are termed improperly demesne, which are in the hands of an inferior lord or tenant, nor can such a one in propriety of speech be said to stand seised of any land whatsoever *in dominico suo;* but if you observe narrowly the manner of pleadings, the words are used in a proper sense, for you shall never find that an inferior lord or tenant will plead that he is simply seised *in dominico*, but still with this addition, *in dominico suo nt de feodo;* and that very aptly, for this word 'fee' implieth thus much, that his estate is not absolute, but depending upon some superior lord. Therefore, we conclude with the feudists, that a common person may aptly be said to stand seised *in feodo*, or *in dominico suo ut de feodo*, but improperly *in dominico* simply (*a*)." He then refers to *Bracton* and *Fleta*, and, after noticing that copyholds are parcel of the lord's demesnes, he concludes (*b*) that those lands alone can properly be of the lord's demesnes (if any lands in

(*a*) Section 12. (*b*) Section 14.

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the possession of inferior lords may properly challenge that name), which the lord reserveth in his own hands for the maintenance of his own board or table, be it his waste ground, his arable ground, his pasture ground, &c. Sir *Wm. Blackstone* (*a*) takes the distinction noticed in the argument between demesne and tenemental lands, and describes the demesnes as lands which the lord of a manor kept in his own hands for the use of his family; and they were called *terræ dominicales*, or demesne lands, being occupied by the lord, or *dominus manerii*, and his servants.

Upon these authorities, we think we are fully warranted in saying, that, though the word "demesne" may in some cases be applied to any fee-simple lands a man holds, yet it is more correct and usual to apply it to the lands of a manor, which the lord of that manor either actually has, or potentially may have, *in propriis manibus*.

The effect of the grant in question will then be perfectly clear. It will have conferred on Sir *R. T.*, his heirs and assigns, a right of free warren and free chase in those lands within the manor of *Alton*, which Sir *R. T.* had as lord of that manor under the description of his demesne lands, and it will have conferred on them a similar right in whatever tenemental lands Sir *R. T.* then held in fee, either of the King or of any lord within the limits mentioned in the grant, but it will have conferred no other right. No other right then will have been conferred by implication, and the anomaly, not to say the indecorum of a subject's right to free warren and free chase in the lands of the crown, while in the occupation of the crown, will not have occured. We have not noticed the case of *Carr* v. *Smith*, referred to on the argument, because we

(*a*) 2 Comm. p. 90.

think this case sufficiently clear on the grounds we have mentioned.

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Judgment for the Attorney-General.

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SCOTT, *qui tam*, &c. *against* MARSHALL and Another, Sheriff of Middlesex.

DEBT on stat. 23 H. 6. c. 9. against the defendants, as sheriff of Middlesex, for treble damages for taking from the plaintiff, under colour of their office, the sum of 3*l.* for letting the plaintiff to bail upon a bill of Middlesex, being a larger sum than was allowed by law for the same (viz. 4*d.*); the further sum of 3*s.* under pretence of a fee for searching the office of the sheriff; a further sum of 3*s.* under pretence of a fee for a second search; and the sum of 2*s.* 6*d.* under pretence of a fee before they would let the plaintiff to bail.

At the trial, before Lord *Lyndhurst* C. B. the plaintiff produced an examined copy of the writ, indorsed "*Radford* & Co." and proved that a bailiff named *Radford* had made the arrest, and taken 3*l.* for a bail-bond, and 3*s.* for searching the sheriff's office for a detainer. Mr. *W. Burchell* from the sheriff's office proved, that writs usually came there indorsed by the plaintiff's attorney with the name of the officer by whom they were to be executed; that in general, that officer was adopted, but if not, his name so indorsed was struck out, and the name of another inserted; and that if the writ came to the office without any indorsement made on the writ by the plaintiff's attorney.

In an action upon 23 H. 6. c. 9. against a sheriff for extortion, his connexion with the act of his bailiff is sufficiently established by producing the examined copy of a writ returned with the name of a sheriff's bailiff indorsed, and proving that process was executed by a bailiff of the same name, and that it is the practice of the sheriff's office to indorse on the writ the name of the bailiff to whom the warrant to arrest is delivered, or to adopt any such indorsement of a bailiff's name

Quære, whether 23 H. 6. c. 9. be repealed by 32 G. 2. c. 28. and whether, if it is not, the sheriff is liable for extortion committed by the bailiff for his own benefit?

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ment it was indorsed there. Also that where the officer is changed before the warrant was executed, the name originally indorsed on the writ still remained, (the taking it off the file to alter the indorsement being inconvenient,) and such name was returned with the writ; but that a memorandum of such change was made in a book kept in the sheriff's office. Mr. *Chapman*, a master in K. B. proved that nothing was allowed for a bail-bond on taxation between party and party. An objection for the defendants, that the warrant not having been produced, no connexion between the sheriff and the officer was established, and that as the money did not appear to have been taken for the benefit of the sheriff, the action should have been brought against the officer who received it, was overruled. Verdict for the plaintiff for 9*l.* being treble damages on the sum taken for a bail-bond, and for the single sum of 8*s.* charged for searching the office. The jury also found that the money was not received for the personal benefit of the sheriff.

*Burchell* moved for a rule *nisi* to enter a verdict for the defendant. The finding of the jury that the money taken by the officer was not received for the personal benefit of the sheriff amounts to a verdict for defendant. Since *Woodgate* v. *Knatchbull* (*a*), and *Martin* v. *Bell* (*b*), it cannot be objected that the action is founded on a penal statute; but the fees there taken were sheriff's fees, so that the sheriff was properly made the defendant. However, as stat. 8 H. 6. c. 28. clearly distinguishes the offices of sheriff and bailiff, as well as the fee to be taken by each, it may be inferred, that each was to become separately liable to those penal provisions, and that the party actually guilty of the extortion was to be the defendant. He also moved in

(*a*) 2 Term R. 148.

(*b*) 6 Mau. & Selw. 223; *S. C.* 1 Stark. 413.

arrest of judgment, that the statute 8 H. 6. was repealed by 32 G. 2. c. 28. and that the amount of the fee which the sheriff is entitled to take by law has since that act been regulated by the allowance of the master on taxation. *Martin* v. *Bell*, *Martin* v. *Slade* (*a*), *Jaques* v. *Whitcomb* (*b*), *Lovell* v. *Simpson* (*c*), *George* v. *Perring* (*d*), *Boldero* v. *Moss* (*e*), *Wright* v. *Ager* (*f*).

He then urged, in support of a rule for a new trial, that the copy of the writ as returned by the sheriff, without the indorsement thereon, being secondary evidence, was inadmissible, as the writ itself might have been produced. The proper evidence to connect the sheriff with the acts of his bailiff executing process, is the warrant, which, when executed, remains in the hands of the latter for his justification. The proof of the warrant therefore cannot be dispensed with, though a notice may have been given to the sheriff to produce it. The text writers concur in stating it to be necessary. In *Peake on Evidence*, p. 442. 5 edit. it is laid down, that "the plaintiff must first give in evidence the warrant of the defendant, either by calling the bailiff to produce it, or else by proving that it has been returned to the sheriff's office; and then, after proving notice, to produce a copy or parol evidence may be given of it." *Phillipps*, vol. 2, p. 127, states the rule to be, "the fact of the sheriff having given authority to the bailiff is best proved by the warrant itself, which, in cases where it has been executed, is usually kept in the custody of the officer. For the purpose therefore of producing it, the officer should be served with *subpœna duces tecum*;" "a notice served upon the sheriff is not sufficient, unless the warrant has been returned." To the same effect is *Roscoe* on Evidence, 483, 2d edit. The rule

(*a*) 1 New Rep. 59.
(*b*) 1 Esp. 361.
(*c*) 3 Esp. 153.
(*d*) 4 Esp. 63.
(*e*) 3 Term Rep. 417.
(*f*) 5 B. Mo. 330.

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of evidence laid down by these writers is fully supported by the cases referred to, and by other authorities. In *Drake* v. *Sykes* (*a*) it was held, that the privity between the sheriff and a bailiff must be established by proving the original warrant directed by the sheriff to such bailiff, or such a notice as would, in case of non-production, let in secondary evidence of its contents. In *Forsick* v. *Magnay* (*b*) an action against a sheriff for not arresting, it was decided that the officer's name appearing on the writ, with a return of *non est inventus* by the old and new sheriffs, after the old sheriff had gone out of office, was not sufficient to connect the defendant with the officer. In *Martin* v. *Bell* (*c*), an action on stat. 23 H. 6. c. 9. and 32 G. 2. c. 28. the plaintiff gave in evidence an examined copy of the precept to the sheriff, with the bailiff's name indorsed upon it, and the sheriff's return of *cepi corpus*. The defendants had been served with a notice to produce the warrant, and it was proved to be the usual course in the sheriff's office to indorse upon every warrant, before it was issued, the name of the officer by whom it was to be executed; and that the warrant, if unexecuted, was returned to the office, but if executed, was kept by the bailiff. Lord *Ellenborough* was of opinion that it was necessary to produce the warrant, or to show some recognition on the part of the sheriff or the agency of the bailiff.

In *Morgan* v. *Bridges* (*d*), which was an action against the sheriff for an escape on mesne process, the plaintiff proved an examined copy of the writ, with the name of an officer indorsed upon it; and that it was the practice of the sheriff's office to indorse upon the writ the name of the officer or officers appointed by the sheriff to execute the writ. It was contended, that this was sufficient

(*a*) 7 Term Rep. 113.
(*b*) 1 Marsh. 554; *S. C.* 6 Taunt. 231.
(*c*) 1 Stark. R. 413.
(*d*) 2 Stark. R. 314.

to show that the bailiff whose name was indorsed, made the arrest under the authority of the sheriff, and *M'Neil* v. *Perchard* (*a*) was cited; but upon the authority of the cases of *Jones* v. *Wood* (*b*), *Blatch* v. *Archer* (*c*), and *Hill* v. *The Sheriff of Middlesex* (*d*). *Abbott* J. held that it was incumbent on the plaintiff to give further evidence to connect the defendant with the act of the officer, who then produced the warrant. In *Hill* v. *The Sheriff of Middlesex*, the C. P. held that an examined copy of a writ returned with a bailiff's name indorsed thereon, without proof that the name was written by the sheriff's authority, was no evidence to prove that the warrant was made to that bailiff. In *Jones* v. *Wood*, an action for a false return, Lord *Ellenborough* held, that to connect the sheriff with the acts of the officer, it was not enough to show that the officer's name was written on the margin of the examined copy of the writ and return.

Some cases which may be cited as apparently adverse will be found either to have proceeded upon similar principles to those acted upon in the cases before referred to, or not to decide that the evidence here produced was sufficient to fix the sheriff. In *Blatch* v. *Archer*, the warrant was not produced, but no objection was taken on this ground at the trial; and it is reported that the sheriff's agent, who could have proved the warrant, upon being called, "ran out of court to avoid being examined." This is treated as a material fact in the judgment of *Aston*, J. and might probably have led to an inference of fraud on the part of the under-sheriff; but at all events, the case on this point is entitled to no weight, as the objection was only taken in the course of the argument; and the opinion that may be collected from the judgments of Lord *Mansfield* and *Aston*, J.

(*a*) 1 Esp. 265.
(*b*) 3 Campb. 229.
(*c*) Cowp. 63.
(*d*) 7 Taunt. 8.

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that the mere indorsement of the bailiff's name on the writ is sufficient to charge the sheriff for his acts, has long since been overruled. *M'Niel v. Perchard* was an action against the sheriff of *London*, and it was proved to be the usage of that office to indorse the name of the officer to whom the warrant was directed in the office. The same evidence of usage in the office of the sheriff of *Yorkshire* was given in *Tealby* v. *Gascoigne* (*a*), with the additional fact that the name of the bailiff had been indorsed upon the writ in the office. Similar evidence relative to the practice in the office of the sheriff of *London* was adduced in *Bowden* v. *Waithman* (*b*). In *Francis* v. *Neave*, Bart. sheriff of *Essex* (*c*), the witness from the sheriff's office who produced the writ stated, that the writ came to the office from the plaintiff's agent, marked with the bailiff's name, and that he (the witness) again indorsed the bailiff's name on it.

In all these cases, the writ itself with the original indorsement of the officer's name, and not merely an examined copy, was produced; and therefore, admitting them to be adverse authorities, they do not establish that an office copy of the indorsement, which is no part of the record, is admissible evidence to establish the liability of the sheriff for the acts of the officer.

Lord LYNDHURST C. B.—The cases most relied upon in support of the motion for a new trial are nisi prius decisions; but the question as to the effect of the evidence now objected to came under the review of the whole court of C. P. in *Francis* v. *Neave*, *Fermor* v. *Phillips* (*d*), and *Bowden* v. *Waithman*. That court in those cases deliberately decided, that this evidence, *primâ facie*, is sufficient. The evidence as to the

(*a*) 2 Stark. 202.
(*b*) 5 B. Mo. 183.
(*c*) 3 B. & B. 26.
(*d*) 3 Br. & B. 27, n.; Holt, 537. S.C.

course of practice in the sheriff's office, relative to the indorsement of the officer's name by the attorney for the plaintiff, amounts to the same thing as if the indorsement were written by the under-sheriff himself, or by some person expressly authorized by him. But it was further proved, that though sometimes the officer whose name was indorsed was changed before the execution of the warrant, no alteration of the indorsement was in such case made, whence it was argued, that there is no absolute certainty in this case that the officer *Radford* acted under the sheriff's authority; however, an entry of any such change is made in a book kept at the sheriff's office, and as such change, when it actually takes place, is an exception from the course of office, it might have been shown by producing the book. The evidence here given was not offered as conclusive, nor do I so consider it but merely as *primâ facie* evidence, which might have been rebutted by the production of the sheriff's book, containing an entry of a warrant subsequently granted to a different officer. In my opinion therefore the writ, with this indorsement, was sufficient *primâ facie* evidence, and as the writ is filed of record, I can see no objection to the admissibility of an examined copy.

BAYLEY B.—I think that there was sufficient *primâ facie* evidence in this case to connect the sheriff with the acts of the officer, whose name was indorsed on the writ; nor in this decision do we do more than bind the sheriff by the practice in his own office. It is clear, according to the testimony of Mr. *Burchell*, that *some* name is indorsed upon the writ before the warrant is granted, either in the sheriff's office or before the writ comes there, and that the indorsement which appears on the writ when it is returned has been authorized by the sheriff. After the writ is returned and filed, we

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must not presume that the officer who executed it would commit the offence of altering it. It was also proved to be the course of the office to deliver the warrant to the officer whose name was indorsed on the writ, and we must therefore conclude that *Radford*, whose name is so indorsed, acted under the authority of the sheriff. In *Forsick* v. *Magnay* it was assumed, that if the plaintiff could have made out that the name of *Owen*, the officer, on the back of the writ, was placed there by the authority of the late sheriff, that would have been sufficient to sustain the action, as it would have amounted to a recognition that *Owen* was his officer. So in this case, I think that the indorsement of *Radford*'s name amounts to an acknowledgment by the sheriff that he granted the warrant to that officer.

GARROW B.—The practice of calling the sheriff's bailiff to produce the warrant in actions against sheriffs has only been introduced of late years. It has placed the plaintiffs in these actions under great difficulties; so that I am not inclined to extend the rule of evidence, which declares this course to be necessary. Two cases occurred before me on the Home circuit, in which an objection similar to the present was taken on the part of the sheriff (*a*). In the first, I thought that the pro-

(*a*) The former of these cases was not moved. The latter was as follows: *Digby* v. *Cure*, an action for an excessive distress, *Essex* Spring Assizes, 1831. The plaintiff produced an examined copy of the writ, returned with the name of *John Smith* indorsed thereon, who was proved to have executed the process; and the under-sheriff stated, that he had seen the writ in the office, before it was returned, with the name of *John Smith* indorsed. On an objection raised by the defendant's counsel, that this evidence was insufficient to connect the sheriff with the acts of *Smith*, *Smith* was called to produce the warrant, and on his evidence the plaintiff elected to be nonsuited *Gurney*, in the following term, obtained a rule to set aside the nonsuit, and for a new trial; against which, *Law* and *Thesiger* showed cause citing Starkie on Evidence, 1339, Phillipps on Evidence, 239. *Hill* v. *The*

duction of the writ, with the officer's name indorsed upon it, was, in connexion with the other circumstances in evidence, sufficient to dispense with the necessity of producing the warrant; but in the second, yielding to the authority of the cases cited by the defendant's counsel, I felt bound to require further evidence, and the officer was called into the witness box. I was not surprised, that on his evidence the plaintiff submitted to be nonsuited, as he came to speak to his own misconduct, and was, in fact, the real defendant in the action. The same result must frequently happen if such testimony was necessary to support similar actions. I think, however, that in this instance the necessity did not arise; but that the indorsement on the writ and the course of practice in the sheriff's office sufficiently identified the officer with the sheriff, and consequently, that on this point no rule should be granted.

VAUGHAN B. concurred.

Rule refused.

*Sheriff of Middlesex*, &c. They admitted that the writ itself, with the indorsement of an officer's name, coupled with the proof of practice in the sheriff's office, as to such indorsements, was good evidence; but they insisted that an examined copy was not, as the indorsement was no part of the record. *Gurney*, contrà, contended, that the writ as returned was a record, and consequently that an examined copy was admissible evidence. The custom of all sheriff's offices was to indorse the name of the officer appointed to execute the writ, and therefore *primâ facie* such indorsement was evidence of authority from the sheriff. Lord TENTERDEN C. J. Independently of this question, the evidence of the under-sheriff was sufficient, and puts an end to the case. He said he saw the writ before it was returned, with the name of *John Smith* upon it. TAUNTON, J.—I think the act of the sheriff in returning the original writ was an adoption of *Smith* as his officer.

Rule absolute.

In *Snowball qui tam* v. Sir *Henry Goodriche*, K. B. *Hilary* term 1832, *John Williams* obtained a rule for a new trial on a similar point, which is believed to be now pending.

The Reporter is indebted to a friend for the above case, having been prevented by illness from his usual attendance.

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## BLACKETT *against* THE ROYAL EXCHANGE ASSURANCE COMPANY.

Insurance on ship and on body &c. boat and other furniture of ship, free of average on ship under 3*l.* per cent. except general. A boat slung on the davits on the quarter was lost at sea, and another average loss occurred by stranding. Both losses taken together exceeded 3*l.* per cent., but neither taken singly reached that amount. Held: that parol evidence of usage of underwriters not to pay for losses of boats so slung, was inadmissible, and that average losses individually less than 3*l.* per cent., but exceeding that sum, if taken together, might be joined so as to charge the assurers on the memorandum.

COVENANT on a policy of insurance for 3000*l.* "on the ship" (written) then (printed) "upon any kind of goods and merchandize whatsoever loaden or to be loaden; and also upon the body, tackle, apparel, ordnance, ammunition, artillery, boat, and other furniture" of the ship *Thames*, on a voyage from *London* to *Calcutta* and back; subject to the usual memorandum "free from all average on corn, flour, fish, salt, fruit, seed, hides, and tobacco, unless general or otherwise specially agreed, free from average on sugar, rum, skins, hemp, and flax under 5*l* per. cent., and on all other goods and on ship under 3*l.* per cent. except general." Without the words "or if the ship be stranded" (*a*). At the trial before *Vaughan* B., at the *Guildhall* sittings after *Trinity* term 1831, the average loss on the ship appeared occasioned by a stranding in the River *Hooghly*, near *Calcutta*, of less than 3*l.* per cent., but a previous loss of the pinnace at sea made the whole loss exceed 3*l.* per cent., for the amount of which the action was brought. The boat was proved to have been slung on the davits on the larboard quarter, and to have been properly so placed for the better security of the lives of sailors falling overboard, and it was stated that on all voyages a boat was invariably so placed. It was also proved to have been properly lashed there, and that it was lost by the breaking of the stem ringbolt in a storm. The question was, Whether the two losses could be joined together so as to charge the underwriters? The defendants offered witnesses to prove the usage that underwriters did not pay for boats slung in the manner

(*a*) See 7 T. R. 215.

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proved (*a*). The learned judge rejected the evidence, and the plaintiff had a verdict for the average loss. In *Michaelmas* term last, the *Attorney-General* moved by leave of the learned judge, for a nonsuit, on the ground that distinct losses, individually less than 3*l.* per cent., could not be joined so as to make particular average above that amount recoverable, or for a new trial for improper rejection of evidence. On the last point he cited *Pelly* v. *Royal Exchange Assurance Company* (*b*). [*Bayley* B. There the only usage proved was of a fact that the sails, &c. of ships arriving in *China*, were put on land during their stay there. But evidence of general understanding or opinion is not receivable to contradict a written instrument, though evidence of specific instances, in which claims in respect of boats so slung and washed away, had been successfully resisted, might have been admissible. *Vaughan* B. No evidence was given that the boat was improperly slung; but it was proved that it was the invariable custom so to sling boats. I refused to receive evidence of persons from *Lloyd's* whether a boat so slung was covered by the policy.] Admitting it properly slung, a boat so lost is part of the wear and tear (*c*), or is like goods lashed on deck, which, though within the words of the policy, are not paid for under it. On the other point, the memorandum was intended to protect insurers from petty losses occurring during a protracted voyage. [*Bayley* B. If sugar gradually melts away from a leak, that is an injury progressively increasing each day, and though it may be in great part or entirely lost, the freighter may not be able to point out the amount of loss on any given day (*d*).] *Stevens* on Average, p. 209, says the damage on *each* article enumerated as free of average under

(*a*) See *Stevens* on Average, 153, 154.
(*b*) 1 Burr. 241.
(*c*) See *Stevens*, 2 ed. 150, 153, 158.
(*d*) See 15 East, 559; 16 Id. 214.

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5*l.* per cent. must amount to 5*l.* per cent. A rule having been granted on both points,

*Spankie* Serjt. and *Maule* showed cause. The boat is admitted to have been properly slung, and the evidence to show the usage of underwriters not to pay for losses of boats so slung was properly rejected. A boat is *eo nomine* included in this policy, and is part of the ship's furniture. Then the written contract cannot be contradicted or controlled by parol evidence, so as to alter its effect (*a*). By the usage of old *Lloyd*'s, where the particular average loss exceeded 3*l.* or 5*l.* per cent., that per centage was deducted by the assurers from the amount of the loss, they only paying the excess (*b*) but the terms of the memorandum are now held to prevail. The main question therefore is, can distinct losses be added together so as to constitute an average or partial loss exceeding 3*l.* per cent? and it will be said for the defendants that they cannot, and that a partial loss must be a loss on a particular occasion. The memorandum first appeared on policies in 1749, to protect insurers against trifling demands necessarily arising from the perishable nature of particular articles (*c*), and no certain meaning is applicable to it by any uniform usage of the law merchant, *Bowring* v. *Elmslie* (*d*), consequently Lord *Kenyon* there applied to it the general rule of law for construing written instruments containing exceptions, viz. that the exception should control the instrument as far as its words extend, and no further;

(*a*) *Parkinson* v. *Collier*, Park on Ins. 7 ed. 470

(*b*) *Valin*, p. 367, states a similar practice against the words of the French Ordonnance of *Marseilles*, but *Emerigon*, a later writer, says, that except otherwise provided, " on s'en tient à l' ordonnance et si l'avarie excede un per cent. (the sum in the French ordonnance) les assureurs doivent payer l'entiere avarie sans aucune deduction."

(*c*) 1 Magens, 16; 1 Marsh. on Insurance, 222; Park, 7 ed. 95.

(*d*) *London* sittings after *Trinity*, 1790; 7 T. R. 216, n.

so that on the case being taken out of the letter of the exception the body of the instrument operates in full force. *Cantillon* v. *The London Assurance Company* (*a*) was affirmed in *Burnett* v. *Kensington* (*b*), and shows that the clause, free of average "except the ship be stranded," omitted in this memorandum, was in the nature of a condition, and that on its occurrence the assured was let in to prove an average loss. The memorandum does not in terms require one single undivided loss amounting to *3l.* per cent., and the object of the insurance is to provide indemnity against every contingency of the voyage. If, on the arrival a ship, damaged to an amount exceeding *3l.* per cent., the insurers must institute an inquiry whether the loss occurred by one accident, or a series of them, it would be contrary to the whole tenor of their undertaking, and yet in case of sea damage to ship or goods, in the course of a long voyage, especially to the goods enumerated in the ordinary memorandum, be constantly occurring. In *Le Cheminant* v. *Pearson* (*c*) an underwriter may be liable to an average as well as a total loss, or for money and labour bestowed about the defence, safeguard, and recovery of a ship to a much greater amount than the subscription; for a policy is a contract to indemnify the assured, and therefore distinct from a bond in a penalty, where, on paying the penalty, the liability is ended. The material ingredient in that case was, that the average loss being repaired before the total loss, the assured had a certain claim for the former; as appears in *Livie* v. *Janson* (*d*), where the policy was on ship and goods warranted free from American condemnation. The ship, in attempting to escape an American embargo, sustained average loss at night by peril of sea, and the total loss happened next

(*a*) A. D. 1754; 3 Burr. 1553; 2 Magens, 335. (*b*) 7 T. R. 210.
(*c*) 4 Taunt. 367. (*d*) 12 East, 648.

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day by American condemnation. The average loss was held not recoverable, for the property of the insured being annihilated, the previous damage to it was of no consequence to him. As the assured cannot sue an underwriter in case of sea damage till it is ascertained to have been incurred, then, till the voyage terminates, the insured cannot tell whether or not an average loss has been sustained; for the vessel might afterwards be lost by a peril not insured against, or might suffer a total loss; in which, as in *Livie* v. *Janson*, the partial loss would be entirely merged. Again, if no repairs are done during a voyage, the assured cannot sue till the voyage is ended. *Stevens* (*a*) only states the question to be undecided whether the insurers are liable when a ship, having sustained damage under 3*l.* per cent., repairs at an intermediate port, and afterwards sustains similar damage, which added to the former, makes the amount 3*l.* per cent., but does not add, that if the damage be not repaired, and the ship arrives with sea damage above 3*l.* per cent., the underwriters are not liable. *Emerigon* (*b*), speaks of "avarie" and "avaries" as convertible terms, and synonimous with damage and damages, and in translating the words in the English memorandum "free of average under 5*l.* per cent., &c." renders them "franc d'avaries;" thus considering that expression perfectly equivalent to the English singular "average." If distinct damages may not be joined, so as to make one average loss above the fixed per centage, then if sugar and like articles should flow out from day to day during weather alternately good and bad, or bad during all the voyage, it would be almost impossible to show a distinct individual damage. Again, a loss of 99*l.* per cent. might accrue

(*a*) 2 ed. 213.

(*b*) Traité des Assurances, &c. edit. Paris, 1827. Tom. 2. p. 3. 4. ch. 12. § 44.

from successive piracies of less than 3*l.* per. cent., and though the discontinuity of each loss might be distinctly proved, the assured would be unable to recover.

The *Attorney General*, *Campbell* and *Follett* contrà. The defendants, without assuming that the boat was improperly slung, tendered witnesses to show that by the usage of underwriters a boat so slung is not paid for when lost. For the question being what is protected by the policy, such evidence of usage was admissible to explain the meaning attached to the expressions of the contracting parties by mercantile construction, as distinguished from their popular sense. In *Gabay* v. *Lloyd* (*a*), insurers from *Lloyd*'s were examined as to the usage of settling losses under the word "Mortality" in a policy. So in *Palmer* v. *Blackburn* (*b*), merchants of experience at *Lloyd*'s were admitted as witnesses to charge the underwriters. The question as to goods lashed on deck has been, not whether they were properly lashed there, but whether goods so placed were covered by the policy? And by the usage which has prevailed as to construing the words "laden on board" in a policy, they were held not protected (*c*). [*Bayley* B. Goods so lashed are not duly laden on board as part of the cargo, for they incur greater risk of being washed away or being thrown overboard first in case of distress, but this boat was proved to be in the place invariably used for it.] The written subject-matter of this insurance being the ship, it was competent to prove the usage that the boat so slung was not part of her furniture. In *Da Costa* v. *Edmunds* (*d*), on its being shown that the deck was a usual place for stowage of vitriol, the insured recovered. Again, usage of merchants has been received to show that rice is not corn, nor saltpetre

(*a*) 3 B. & C. 793. (*b*) 1 Bing. 63. (*c*) See Park's Ins. 7 ed. 26.
(*d*) 4 Camp. 142. Affirmed in Banc.

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salt within the memorandum (*a*). [*Bayley* B. The evidence rejected was tendered to show that the boat, without which the ship would not be completely equipped, was not part of her furniture. But such a boat properly secured in the right place is as much a part of the ship as the masts and sails. Assurers and assured are interested in the preserving the lives of the sailors.]

Nor can average losses individually less than 3*l.* per cent. be added together so as to exceed that amount. Underwriters must either submit to pay without objection, or be exposed to the necessity of instituting inquiries into the circumstances under which a succession of petty losses may have occurred. Each loss is one of a series of breaches of covenant arising successively, but no one taken singly is without the exception in the memorandum. Then they cannot be added together, so as to produce a different effect in the aggregate, viz. to satisfy the restraining words of the memorandum, by condensing distinct losses, which have no connection with each other, and separately taken do not amount to 3*l.* per. cent. No claim against the assurers arose from the specific loss of the boat in this case. Then a line should be clearly defined and adhered to, to prevent underwriters from being harassed by petty demands.

This case differs from that of sugars washing out, in the course of a voyage, as to which the end of the voyage may be taken as consummating the damage: but the two losses are here as distinct damages, as if a fresh boat had been procured, or as if damage to the vessel on the outward voyage had been repaired instanter before the return to the port of discharge. Nor does general average arise from minute loss or wear and tear; but in case of jettison or ransom, or going into port

(*a*) *Scott* v. *Bourdillon*, 2 New Rep. 213. Park. Ins. 7 ed. 179.

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to repair, the memorandum is a warranty introduced to avoid the difficulty of distinguishing wear and tear from the perils of the sea which occasion it. The insurance is against a specific loss, not against the result of several. Had another boat been procured at *Madras*, *Le Chemisant* v. *Pearson* shows the assured might have sued for it as an average loss, and that had a total loss accrued subsequently, it might have been afterwards recovered as such. Suppose a partial loss occurred above 3 per cent. and the insured recovered their loss by repairs in an action, could the underwriters be liable to a second action for another loss under 3 per cent. in same voyage? [Lord *Lyndhurst* C. B.—The plaintiffs, in answer to that, ask if an action can be maintained before the event of the voyage is known?]

*Cur. adv. vult.*

Lord LYNDHURST C. B. now delivered the judgment of the Court.

There were two questions in this case, one, whether parol evidence of an usage was admissible to show that for boats on the outside of the ship slung upon the quarter underwriters never paid;—the other, upon the construction of the clause, "free from average under 3 per cent." whether the underwriter is answerable for every instance of damage, however small, if the aggregate in toto amount to 3 per cent.; or whether each instance, where the damage it occasions can be ascertained, and is under 3 per cent. is to be excluded;—and our opinion is against the defendants upon both. The policy is in the usual form as to ship and goods, and, as far as regards the ship, imports to be upon the ship, (that is, the body), tackle, apparel, ordnance, munition, boat and other furniture of the ship called the *Thames*. Here is no exception, and the policy is therefore, upon the face of it, on the *whole* ship, on *all* her furniture, and on *all* her apparel. It was in evi-

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dence in the cause, and admitted upon the argument, that upon such voyages as that insured, ships invariably carry a boat in the place in which this boat was carried, and slung as this boat was slung, and that the ship would not be properly furnished or equipped unless it had a boat in that place and so slung. The objection then to the parol evidence is, that it was not to explain any ambiguous words in the policy or any words which might admit of doubt, or to introduce matter upon which the policy was silent: but that it was at direct variance with the words of the policy, and in plain opposition to the language it used; viz. that whereas the policy imported to be upon ship, furniture, and apparel generally, the usage is to say, that it is not upon all the furniture and apparel, but upon part only, excluding the boat. Usage may be admissible to explain what is doubtful, but it is never admissible to contradict what is plain. The cases which are collected in 1 *Phillipps*, 553 to 559; and 2d vol. 36, 37. and *Starkie upon Evidence*, 1032 to 1038, establish clearly this position.

The authority referred to in the argument as to goods lashed upon the deck, seems to be plainly distinguishable, and to proceed upon a different principle. On an insurance upon goods the underwriter is entitled in general to expect that they shall be carried in that part of the ship usually appropriated to the stowage of goods, not in a more dangerous part; or if they be goods which ought not to be placed in the ordinary stowage, but in a more perilous situation, he ought to be apprized either of the nature of the goods or of the part of the ship in which they are to be put. If he is left to suppose they are ordinary goods, he will naturally suppose they will be placed where ordinary goods are placed, and that they will incur the hazard only of ordinary goods; and if he were to be made answera-

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ble for extraordinary peril, he would be answerable for a peril he had not contemplated, and for which he had not received an adequate compensation. This as it seems to us is the true principle upon which evidence of usage is admitted as to goods lashed upon deck. They are not in the part of the ship where goods are usually carried, they are in more than usual peril, and an usage that they are not covered by an ordinary policy upon goods, but that they require a distinct explanation to the underwriter of the part of the ship in which they are to be carried, or (where that will imply the same information) of the nature of the goods, is not at variance with any part of the policy, is essential to that information the underwriter ought to receive to enable him to estimate the risk and calculate the premium, and is a portion of that fairness which ought to be rigidly observed upon all these contracts. Such a policy is upon goods generally, and the usage explains what description of goods are intended, viz. goods of ordinary, not of extraordinary danger. We are, therefore, of opinion that the evidence of usage was properly rejected.

The next question is upon the effect of the memorandum "free from average under three per cent." The memorandum is in the nature of an exception. The policy is general, extending to all losses; the memorandum excepts losses, where each or all, according to the construction to be put upon it; are under three per cent. The rule of construction as to exceptions is, that they are to be taken most strongly against the party for whose benefit they are introduced. The words in which they are expressed are considered as his words, and if he do not use words clearly to express his meaning, he is the person who ought to be the sufferer (a). The words here used are ambiguous, capable of

(a) 2 B. & C. 207; 5 B. & C. 847 to 851.

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excluding every average which *per se* is under 3*l.* per cent., or capable of including every average, however minute, if the aggregate of different averages come up to that amount. Perhaps usage might explain the ambiguity, and show which of the two alternatives was intended, but there was no evidence of usage. *Emerigon* (*a*) speaks of averages in the plural, as if it was sufficient that the aggregate of the averages amounted to three per cent.; but he does not appear to us to speak upon the subject in such a manner as to justify a conclusion either way upon the point in question, and we are not aware of any other writer of authority that does. In the absence, therefore, of usage and authority, it seems to us that we ought to rest upon the rule of construction we have mentioned, and according to that rule the defendants are responsible if the aggregate of different damages comes up to 3*l.* per cent. The consequence is that the rule must be discharged.

Rule discharged.

(*a*) Tom. ii. p. 3. 4, edit. Paris, 1827.

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## CLUTTERBUCK *against* WILDMAN.

The copy of a *quo minus* served on defendant, purported to be directed to the sheriff of *London*. Further, it contained no signature by the clerk of the pleas, and the notice to appear was for an impossible day, viz. a day in *January* 1831, the service having taken place in *December* 1831. Held, that the service should not be set aside; for the sheriffs of *London* and *Middlesex* are but one officer; the signature of the clerk of the pleas is no part of the writ, and the defendant could not be misled by the day named for appearance.

A COPY of a writ of *quo minus* directed to the sheriff of *London*, and tested 25 *November*, 2 Will. 4. was served on 29 *December* 1831, with a notice to appear on 11 *January* 1831, without appearing to be signed by the clerk of the pleas. *Hoggins* moved to set aside the service, and cited *Price*'s Practice 49, but

*Per Curiam.* The two sheriffs of *London* and *Mid-*

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*dlesex* make but one officer. The mistake of inserting 1831 instead of 1832 in the notice to appear, was not such as to mislead the defendant, who might well understand what the period was to which it really referred. As to the last objection, the defendant has been served with a copy of all that is required by stat. 12 G. 1. c. 29. s. 1. For though the officer's signature may be necessary to authenticate the writ itself by showing him to be satisfied, it is not part of the writ so as to make it necessary to set it forth in the copy served. If it were requisite to state all the matter contained in the writ, the copy must contain the seal also.

Motion refused (*a*).

(*a*) See *Wright* v. *Hooper*, *post*.

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## DAVIES *against* GREY.

The rule of all the courts, *Trin.* 1 W. 4. by which defendants may now put in and justify bail at the same time on giving four days' notice, is an enabling, not a disabling rule; therefore a prisoner may still put in and justify bail on a two days' notice as he might before it.

THE defendant was a prisoner. Notice to put in and justify bail was served on 11 *January* for the 14th, and the bail justified on the latter day. The officer refused to draw up the rule for allowance, and a fresh notice was served by defendant continuing the former notice to the 17th, on which day *Archbold* moved to justify. The objection to drawing up the allowance is, that by the late rule of all the courts (*b*) four days' notice must be given when bail are to be put in and justified at the same time. But that rule was intended to enable those two steps to be taken at once by persons who could not do so before, and not to disable prisoners from putting in and justifying bail at the same time, on giving two days' notice as they might do before the rule, exception to a prisoner's bail not

(*b*) *Trin.* 1 W. 4. vol. i. 520.

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being allowed. The court, (*Bayley*, *Garrow*, and *Vaughan* B.'s,) in order to assimilate the practice, sent these questions to *Parke* J. sitting alone in the practice court of K. B.

Before the rules of *Trinity* 1 W. 4. could a prisoner put in and justify bail on a two days' notice, no bail having been put in at the time of giving his notice?

If he could, is this still the practice or is it altered by the new rule?

PARKE J. After consulting the master returned for answer, "He might before the new rule and may still. The new rule is an enabling not a disabling rule."

Bail allowed.

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## WESTON *against* MAXWELL.

A party arrested as *William Henry Maxwell* will not be discharged out of custody on filing common bail, on the ground that his real name is *William Hamilton Maxwell*, when plaintiff swears that defendant was known to him for five years by the name of *William Henry*, and had told him that was his name, and had signed an agreement with other parties in which he was described as *William Henry*, thus *W. H. Maxwell.*

DEFENDANT was arrested by the name of *William Henry Maxwell.* A rule was obtained for his discharge on filing common bail, and for giving up bail bond to be cancelled on defendant's affidavit that his name was *William Hamilton Maxwell.*

*Kelly* showed cause. The plaintiff's affidavit is, that he had known defendant for five years by the name of *William Henry Maxwell*, and by no other; that defendant had acknowledged that to be his name when questioned before suit, and that he had signed an agreement with certain persons named, thus, *W. H.*

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*Maxwell*, he being several times named in it *William Henry Maxwell*; the defendant is therefore as well known by one name as the other. If there is only a doubt he will be left to a plea in abatement.

*J. Jervis* in support of the rule. One admission by defendant that his name is *William Henry* would not sustain the plaintiff on a plea of misnomer, *Mestaer* v. *Hirtz* (*a*); nor was any credit here obtained by the defendant. *Walker* v. *Willoughby* (*b*). The signing the agreement not under seal is no estoppel.

*Per Curiam.*—This rule must be discharged with costs. If a party has by his own admissions justified another in calling him by a particular name, he is not to find fault with him for acting on the name so acknowledged, though it be not the name of baptism. He has not only acknowledged the name of *William Henry* within the frail recollection of individuals, but has signed an instrument in which he is so described at full length. Is not that an adoption of it so as to show himself known as *William Henry*? Had the defendant been arrested by the name of *William Hamilton*, he might with equal reason have made this application, on the ground that he had never been called or known by any name but *William Henry*.

Rule discharged with costs.

(*a*) 3 Maule & Selwyn, 450. (*b*) 6 Taunt. 538; 2 Marsh. 230.

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## DOE *against* ROE.

Service of declaration in ejectment on person not named therein as tenant in possession.

THE court refused *John Jervis* a rule for judgment against the casual ejector where the notice in the declaration to the tenant in possession to appear was directed to W. Hughes, and the service of the declaration was on W. Jones, *Bayley* B. saying the irregularity was not cured by the words "tenant in possession" in the declaration, and that it was not shown that *Hughes* had been served, or *Jones* called on to appear.

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## STEPHENS *against* ROBINSON and Another.

Plaintiff, who had been the proprietor of a newspaper, agreed with the defendants that they should become the proprietors. He afterwards printed it for them, and paid part of the editor's salary. They paid him to a certain date, but afterwards incurred arrears on these accounts. The affidavit lodged at the stamp office pursuant to 38 G. 3. c. 78. s. 1. & 2. was by the plaintiff, stating himself to be printer "and sole proprietor" of the paper. Held, that he could not recover against the defendants for printing it, or for any other act done by him to further its sale during the time to which the defective affidavit extended.

ASSUMPSIT for work and labour, with a count for money paid. At the trial at the *Middlesex* Sittings before Lord *Lyndhurst* C. B. the cause of action appeared to be for printing a newspaper which had originally belonged to the plaintiff. The sale being inadequate to the expenses, the plaintiff made an agreement with the defendants to become proprietors, and they paid him for the expenses of printing &c. up to *March* 1831. The plaintiff proved that since that time he had printed the paper as well as cards for advertising it, stating its nature, objects, &c., and had also paid the editor part of his salary. 6*l*. had been paid into court. For the defendants was produced the affidavit of proprietorship lodged at the stamp office according

to 38 G. 3. c. 78. sects. 1. 2. and in force during the period in which the printing was executed. The plaintiff had sworn in that affidavit that he was printer and sole proprietor. *Bensley* v. *Bignold* (*a*), and *Marchant* v. *Evans* (*b*) were cited to show, that as the plaintiff was not proprietor, or at utmost not sole proprietor, the directions of 38 G. 3. c. 78. for the protection of the public had not been complied with, so that the publication of the newspaper was illegal, and the plaintiff could not recover. The learned *Chief Baron* nonsuited the plaintiff giving leave to move to enter a verdict.

*Spankie* Serjt. moved accordingly. The intent of the act was only to obtain the name of some responsible person who might be liable for libellous articles. The legal interest in the paper continued in the plaintiff, for he had never conveyed it away. And though as between him and the defendants the equitable interest was in them, still quoad the public and the object of the act, the legal proprietorship remained in him. [*Bayley* B. Then he could not sue for printing his own paper.] *Bensley* v. *Bignold* was a case of a wrong printer's name affixed, and in *Marchant* v. *Evans* no printer's name appeared.

Lord LYNDHURST C. B.—The plaintiff swears that he himself is proprietor when he is not so in fact, nor does he state who is. That omission brings this case within *Marchant* v. *Evans*. The act 38 G. 3. c. 78. provides, that no person shall print a newspaper till an affidavit specifying the real and true names of the printer and publisher, and of all the proprietors, if their number exclusive of the printer and publisher does not exceed two, and if it does, then of two of such proprietors, exclusive of the printer and publisher, is lodged at the

(*a*) 5 B. & Ald. 335. (*b*) 8 Taunt. 142.

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stamp-office. Now nothing which furthers an illegal act, and is done in order to derive advantage from it, can be the foundation of an action. No item unconnected with the paper was claimed at the trial exceeding the sum paid into court. The object of the act was to procure the names of the real proprietors of newspapers, and the plaintiff must be taken to have known that. I am of opinion that the plaintiff is not entitled to recover.

BAYLEY B.—I am of opinion that the plaintiff cannot recover for any work and labour done or money paid by him in furtherance of the sale of this newspaper. The plaintiff takes on himself to say he is the sole proprietor, but his only ground for charging the defendants is, that he is not only not its sole proprietor, but that he has no interest in the paper. The affidavit required by the act should distinctly state who is the printer and who the proprietor of the paper, and where they are different persons, should distinguish between the two.

GARROW B.—If this court should decide that real proprietors of a newspaper might lawfully put forward another person to make the affidavit of proprietorship, the public would lose the protection intended by the act, and the proprietors would screen themselves from their liability.

VAUGHAN B. concurred.

Even where a statute directs a particular thing to be done, the omission to do it is a direct violation of the statute, though a penalty for the omission is annexed. See per *Abbott* C. J. in *Bensley* v. *Bignold*, 5 B. & Ald. 339. 340. where the previous cases on the subject are collected; and see *Little* v. *Poole*, 9 B. & C. 192; *Brown* v. *Duncan*, 10 B. & C. 93.

## FIELD *against* BEACROFT.

1832.

*HENDERSON* moved to enter up judgment on a warrant of attorney executed more than a year before. There was an attesting witness who happened to be also the commissioner before whom the affidavit was sworn, and who had accordingly, as such, signed the affidavit, but did not join in swearing it. The plaintiff swore to the execution.

The subscribing witness to a warrant of attorney must make affidavit of the execution, and his signing the affidavit as the commissioner before whom it is sworn, is not sufficient.

BAYLEY B.—That would not be sufficient unless on affidavit that the attesting witness is dead; and there is no affidavit verifying the execution of the warrant of attorney on oath, for the commissioner was not sworn, and

*Per Curiam.*—Rule refused.

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## WRIGHT *against* HOOPER.

*THESIGER* had obtained a rule for setting aside the service of the *quo minus* and all subsequent proceedings, for irregularity, with costs, for naming the defendant Christopher *Wood* in the direction of the English notice at the foot of the copy served, the sheriff having been directed in the body to take Christopher *Hooper*.

The notice at foot of serviceable process must contain the name of the defendant as well as the writ, therefore where the writ named the defendant as Christopher *Hooper*, and the notice subjoined was directed to Christopher *Wood*, the service of the writ was set aside with costs.

*Hulme* showed cause. The motion should have been to set aside the service of the copy. [*Bayley* B. He is served with the writ by delivery of a correct copy.] The party is correctly described in the body of

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the writ itself. The notice might have been verbal, and was merely subjoined to the writ to inform him of the object of it, and when he was to appear; nor could the mistake mislead the defendant as the return day was mentioned in the body of the writ.

But the court made the rule absolute with costs, saying, that it was an irregularity which deprived the defendant of the benefit of the act of parliament (*a*), which directs him to be served with a copy of the process (*b*).

(*a*) 12 Geo. 1, c. 29.

(*b*) Viz. a complete copy of the whole process. Tidd, 9 ed. 167, 168. See *ante*, 277.

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## SMITH *against* PARSLOW.

In affidavit for judgment as in case of nonsuit, it must be directly sworn that the cause *was at issue* in the proper term.

MOTION for judgment as in case of a nonsuit in a country cause, on an affidavit that special bail were put in and declaration filed in Easter Term; that plea and replication were in Trinity Term; and that the cause then was "by the replication at issue"; but that plaintiff had not delivered the issue, or taken any step since the replication.

*Per Curiam.* The cause would be at issue by the replication, if it was the similiter; but not otherwise. It is better not to deviate from the usual form of stating that the cause is at issue. *Heaton* took nothing by the motion.

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## FOX, Assignee of SUWERCROPP, a Bankrupt, *against* MAHONY.

1831.

TROVER by the assignee of a bankrupt to recover the value of a diamond ring delivered by the bankrupt after the act of bankruptcy to the defendant, for the special purpose of returning it to the person of whom it had been bought. The defendant did not so return it, but pledged it contrary to the bailment. At the trial at *Guildhall* before Lord *Lyndhurst* C. B. the plaintiff relied on the depositions and proceedings taken before commissioners as sufficient evidence of the bankruptcy under 6 Geo. 4. c. 16. s. 92. The Chief Baron admitted them in evidence saying, that the result of the other proofs for the plaintiff must depend on the question Whether that evidence of the bankruptcy was admissible within the act? and left it to the jury to say, whether the defendant had authority to pledge the ring? They found for the defendant. A rule having been obtained to set aside the verdict as contrary to evidence,

Depositions taken before commissioners of bankrupt are conclusive evidence of the bankruptcy under 6 Geo. 4. c. 16. s. 92. though the conversion for which the assignees proceed shall have taken place after the act of bankruptcy; for the bankrupt might have sustained an action up to the time of issuing a commission, and if after that event the assignees should recover, payments to them by the defendant would be protected by s. 94, in case the commission should be afterwards superseded.

*R. V. Richards* showed cause. The plaintiff did not prove his title to sue as assignee of a bankrupt, for the depositions were not sufficient evidence of the bankruptcy under 6 Geo. 4. c. 16. s. 92.; the test of their admissibility being, whether the bankrupt himself could have sued had he not become bankrupt. Now he could not have sued in this case, for the conversion did not take place till after the act of bankruptcy. There was therefore no "debt or demand" for which any right of action could have ever vested in *Suwercropp* before his bankruptcy.

*J. Williams*, *Archbold* and *Kelly*, contrà. The plain-

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tiff was entitled to the benefit of 6 Geo. 4. c. 16. s. 92. so as to make the depositions conclusive evidence of the bankruptcy, for he might have maintained an action for this demand had not he become bankrupt. The object of the act was, that debtors owing money to traders at their bankruptcy, which must be paid to some one, should be safe in paying the assignees without imposing on the latter a necessity to prove their whole title as such. [Lord *Lyndhurst* C. B. As between the assignee and the bankrupt, if two months elapse before proceedings taken by the latter to dispute the commission, it is taken to be regular, but the bankrupt's debtors have no interest in the question, for they must pay either the bankrupt or his assignees. Thus by s. 94. *bonâ fide* payments to assignees of debts claimed or recovered by them are protected from subsequent claims by the bankrupt, though the commission be afterwards superseded.] Section 92 applies, for could the bankrupt have sued, this defendant is uninterested in the validity of the commission. There is nothing in the words or object of the statute to show it to be limited to cases where the whole transaction takes place before the act of bankruptcy. The object applies as much to causes of action arising *after* the act of bankruptcy as before. Sometimes commissions issue on secret acts of bankruptcy committed two or three years before. Then if this act is confined in the manner here contended for, the assignees in actions for debts accruing after the act of bankruptcy will be excluded the relief of this section without reason, as payments to them are protected by s. 94. The act does not make the depositions evidence in actions brought by assignees for "debts accruing *before* the bankruptcy," but "for any debt or demand for which the bankrupt *might have sustained* any action or suit." [Lord *Lyndhurst* C. B. You would add "before a commission had issued," for till that event,

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though after the act of bankruptcy, the bankrupt might sue for a debt due to him before it. Then that class of cases (*a*) does not apply. The words "might have sustained," apply to past time.] The section is incomplete, and words must be interposed by the court in either view of it, but it evidently points to actions which the bankrupt could have sustained if no bankruptcy had taken place. For the right of action after that event being vested in the assignees "might" must mean a time previous to it. Cases of fraudulent preference are not within the intent of the section, for if goods are delivered in fraudulent preference, the bankrupt could not have sued for them, such delivery being good against him though not against the assignees. There can be no difference whether the demand has accrued before or after an act of bankruptcy, for the bankrupt might recover in either case until a commission issued. Then if at the time of the breach of the bailment, the bankrupt might have sued notwithstanding the act of bankruptcy, his assignees may now do so (*b*).

Lord LYNDHURST C. B. I am of opinion that there ought to be a new trial. I think that the construction put by the counsel for the plaintiff on the 92d section of 6 Geo. 4. c. 16. is the true one, and that the intention of the legislature was, that in cases where, if there had been no bankruptcy, the bankrupt could have sustained an action (and where no notice of disputing the commission has been given according to that section) the depositions should be received as conclusive evidence of the matters therein contained. My judgment proceeds on the ground put at the bar, that the defendant is bound to pay the bankrupt or the assignees, and if he pays the latter is protected by section 94 from future claims by the bankrupt, though the commission be afterwards

(*a*) Semb. *Forster* v. *Allanson*, 2 T. R. 479. And see *ante*, 21 n. (*b*).

(*b*) The arguments on the rest of the evidence are immaterial here.

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superseded. I am therefore of opinion, that the depositions taken before the commissioners were in this case properly received, within 6 G. 4. c. 16. s. 92.

The rest of the court concurred.

New trial granted on payment of costs as for a verdict against evidence (a).

(a) An application to make the rule absolute without costs, or for the costs to abide the event, was refused, there being no misbehaviour, but only error by the jury on the authority to pledge.

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## Davis *against* Morgan and Others.

If one of several defendants is abroad, the court will not order that service of process on his wife shall be good, or restrain the other defendants from pleading in abatement in an action ex contractu. See now Reg. Gen. T. 2 W. 4.

*E. V. Williams* moved for a rule to show cause why the service of a *quo minus* on the wife of one of the defendants, a sea captain, during his absence abroad, should not be deemed good service as to him, or why, the action being ex contractu, the defendants should not be restrained from pleading thereto in abatement.

Lord Lyndhurst C. B.—This plaintiff should have sued in a court where he might proceed to outlawry against the absent defendant.

Motion refused.

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## DOE *dem.* BARNEY and Others *against* ADAMS.

EJECTMENT for a house on two demises, the first by *Barney* and *M. Doyle*, the second by *M. Doyle*, against the assignees of a lease, for a forfeiture by non-payment of rent and not insuring the premises from fire. By the lease, between *Barney*, mortgagee of the demised premises, of the first part; *M. Doyle*, widow, sole acting executrix, named and appointed in and by the last will and testament of *J. Doyle*, deceased, (the mortgagor,) of the second part; and *N. L. D.* (original lessee), his executors, administrators, and assigns, of the third part; *Barney*, at the request and appointment of *M. Doyle*, demised and leased, and *M. Doyle* demised, leased, ratified and confirmed unto *N. L. D.*, his executors &c., the premises in question, *habendum* for a term yet unexpired, at the yearly rent of 45*l.*, payable to *M. Doyle*, her executors &c., by quarterly payments. Covenants by *N. L. D.* with *Barney*, his heirs, executors, and administrators, and with *M. Doyle*, her executors, administrators, and assigns, to pay rent to *M. Doyle* accordingly, and to keep the premises insured from fire during the term. Proviso, that if the said rent should be in arrear 21 days after any of the days fixed for its payment, or if *N. L. D.*, his executors, &c. or assigns, should not well and truly observe, &c. all and singular the covenants and agreements in the indenture before contained by him and them to be observed, &c., the lease and covenant for quiet enjoyment should wholly cease, determine, and be void; "and that the said *Barney* and *M. Doyle, or either of them*, their or either of their executors, administrators, and assigns, should or lawfully might at or immediately, or at any time after such breach, non-observance or non-performance, enter into or upon the said thereby de-

Lease by mortgagee and executrix of mortgagor. Mortgagee demised, and the executrix of mortgagor demised and confirmed:—Held, that it operated as the demise of mortgagee, and the confirmation of the executrix of the mortgagor; and that a re-entry under a power reserved for that purpose "to them or either of them," ehured to revest the former estate, and to give the legal estate to the mortgagee. Accordingly a count in ejectment for a forfeiture, laying the demise in the two jointly, was held not sustainable.

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mised premises, or any part thereof, in the name of the whole, and re-possess, retain, and enjoy the same as of his and their former estate, and as if those presents had not been made, any thing therein contained to the contrary thereof in anywise notwithstanding."

At the trial at *Westminster* before Lord *Lyndhurst* C. B. it was urged for the defendant, that the legal estate was vested in *Barney* alone as mortgagee, whereas no demise by him only was laid in the declaration. The lessor of the plaintiff had a verdict, with leave to the defendant to move for a nonsuit; and a rule having been obtained accordingly,

*Andrews* Serjt. and *Steer*, showed cause. The demise and lease was by *Barney* as mortgagee, and also by *M. Doyle*, as executrix of mortgagor, though she also ratified and confirmed the lease. The power of re-entry is given to *Barney* and to *M. Doyle* jointly, or to either, for the breach of the covenant with both for payment of rent to *M. Doyle* only; that shows she has an interest sufficient to support a covenant for re-entry by her. On the second demise by *M. Doyle* alone, they observed that it was not for the assignee of the lessee to deny the title of either of the lessors to demise or stipulate as in the lease. In *Doe* d. *Bedford* v. *White* (*a*), the lessees granted an underlease, reserving a right for the lessees and lessor to re-enter in case of non-payment of rent. The demise was then laid by the lessees only, without joining the lessor, and was held good. For if it was held that the demise must be joint, then the lessor, whose interest was distinct from that of his lessees, might refuse to join them in the entry, and thereby make any loss occasioned to them irreparable. So here, if it were held that *M.*

(*a*) 4 Bing. 276.

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*Doyle* could not re-enter alone, and the mortgagee should refuse to enter, she might lose the rent, without any power of ousting the insolvent tenant.

*Manning* in support of the rule. Though *M. Doyle* had an interest in the rent, she had no title to enjoy the land; but the breach of the covenant to insure makes that point unnecessary. Then the legal estate being in the mortgagee *Barney*, the demise in the lease is by him only, and a right of re-entry can only be reserved to a lessor, and not to a stranger. *Treport*'s case (*a*) is stronger than the present, for here the parties do not assume to demise jointly, but one only demises, which the other confirms. There the lease purported to be joint, and in *ejectione firmæ* the verdict found was special, *viz.* "That *A.* was tenant for life, remainder to *B.* in fee; that both by deed indented joined in a lease to the plaintiff, and that *A.*, the tenant for life, was alive; the jury doubted whether this was in law the lease of both or not: and it was resolved, that presently by delivery of the deed it was the deed of *A.* during his life, and the confirmation of *B.*; and after the death of *A.* it was the lease of *B.* and the confirmation of *A.*; according to the opinion of *Dyer* and *Brown*, *Mich.* 6 & 7 *Eliz.*, and because the plaintiff had declared on a joint demise of *A.* and *B.*, it was adjudged against the plaintiff."

Lord LYNDHURST C. B.—There is no count on the demise of *Barney*, the mortgagee, only. It has been argued that the proviso for re-entry contained in the lease would maintain the ejectment, even if *M. Doyle* had no interest; but that proviso must be taken with reference to the previous description of the parties in the lease. It has also been said that the power of re-entry is reserved to the executrix of the mortgagor and

(*a*) 6 Rep. 15.

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the mortgagee jointly, but their title on re-entry would be to be possessed as of their former estate. The title to the premises being set forth on the instrument of demise, the estate taken by *Barney* on re-entry must be taken with reference to the title so disclosed. Now the moment re-entry is made it enures to his benefit, the legal estate being in him. As to the use of the word "demise" by the executrix of the mortgagor, even if she had not also used the word "confirm," the word "demise" would only have operated as her confirmation.

BAYLEY B.—As *Barney* is described on the face of the deed as mortgagee, the effect of the lease is to operate as a demise by him, and a confirmation by *M. Doyle*, till his estate is determined by paying off the mortgage; after that event it would become the lease of *M. Doyle* and the confirmation of *Barney* (*a*). It was therefore very prudent to have the lease from both. But though *M. Doyle* had a right to confirm, she had no right to the possession while *Barney*'s estate lasted, that is, pending the mortgage; and she could not re-enter till her estate commenced, for no party can have a right to re-enter who has no reversion (*b*). Here an entry, when made, vested the legal estate in possession in *Barney* as mortgagee; and there is no instance in which the mortgagor and mortgagee have been held to have a joint interest.

GARROW B. concurred.

VAUGHAN B.—The question in ejectment is, in whom is the legal estate? Here the party not possessed of the legal estate might perhaps have an equitable title

(*a*) See *Treport*'s case, *supra*.

(*b*) Co. Lit. 214. *Doe* v. *Lawrence*, 4 Taunt. 23. And see *Doe* v. *Goldsmith*, Trin. term, 1832, *post*.

to the rent, but mortgagor and mortgagee could not both have the legal estate.

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Ultimately the rule was discharged, and defendant gave up possession on receiving his costs, on suggestion from the court with reference to other circumstances.

See Vol. I. 313, n. (*a*).

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## BRAITHWAITE and Another, Assignees of HOPWOOD, a Bankrupt, *against* EDWARD WATTS.

Docketing the issue without docketing the judgment, and the debt, damages, and costs recovered thereby, is not a sufficient docketing a judgment within 4 & 5 *W. & M.* c. 20. Therefore, where a committee of a lunatic, against whom judgment had been obtained but not duly docketed, paid over rents to a mortgagee of a date subsequent to the judgment, it was held, that he was not liable as for money had and received to the use of the plaintiff, who claimed as tenant by elegit under the judgment; for it was his first duty as committee to keep down the interest on the mortgage.

DEBT for money had and received by defendant to the use of the plaintiffs. The cause was tried before Lord *Lyndhurst* C. B. at the *London* sittings after *Michaelmas* term, and the following facts were admitted by the parties.

The defendant was committee of the lands of *G. Watts*, a lunatic. In *Hilary* term 1828, the bankrupt obtained a verdict in K. B. against *G. Watts*. In *Easter* term the postea was indorsed on the record, and final judgment was signed. In *December* judgment was entered on the judgment roll. In the *May* of the same year *G. W.* was found by inquisition to have been a lunatic since 31 *October* 1826; on 16 *June* the defendant and *H. W.* were appointed committees of his lands and person, and on 25 *June* they received the usual grant as such. In *August* 1829, the Court of Chancery made an order under 9 *G.* 4. c. 78. s. 1. (*a*) for mortgaging the lunatic's real estate for payment of his debts, and accordingly, on 1 *May* 1830, it was mortgaged to *Hyatt* for 1400*l.* The interest on the mortgage was 70*l.* per annum. The present plaintiffs,

(*a*) Now repealed, 11 *G.* 4. and 1 *W.* 4. c. 65.

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after reviving the judgment by suing out a *scire facias*, issued an *elegit*, under which they, on 25 *January* 1831, obtained from the sheriff possession of a moiety of the lunatic's lands, such moiety being worth 105*l.* per annum.

This action was brought to recover 18*l.* 5*s.* 6*d.* received by the defendant, being on account of rent due for half a year's rent of that moiety, due at *Midsummer* 1831, and the question on the above facts was, Whether the judgment of *December* 1828, had priority over the mortgage of 1 *May* 1830? The defendant contended that it had not, and that the mortgage was entitled to preference, the judgment not having been docketed according to 4 & 5 *W. & M.* c. 20. ss. 1 & 2.

On this subject the clerk of the dockets in the K. B. produced the docket book of that court, stating that it was the only book kept there for docketing judgments, and that no other book was ever produced to persons searching for judgments in that court. In it appeared an entry of the cause *Hopwood* v. *G. Watts*, the lunatic, with the number of the judgment roll; thus showing that the issue roll therein was docketed. The course of office was stated to be, to docket the issues as in the above instance, a number having been first procured from the clerk of the judgments, in order that parties searching in the docket book might find the corresponding number of the judgment roll kept in the treasury of the court. The officer stated, that it did not follow, from such entry in the docket book, that any judgment was afterwards entered up; and that, if judgment was afterwards entered up, no further entry would be made in the docket book, except it were required by a careful attorney to be completed, by adding the amount of the debt or damages and costs. He also said, that, after the entry of the judgment, what was a docket of the issue became a docket of the judgment, and that the number of the judgment roll, when carried

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in, would correspond with that in the docket book, and could be found accordingly by searching the treasury.

The learned Chief Baron reserved the point, and the plaintiffs had a verdict, with leave to the defendant to move to enter a nonsuit. A rule having been obtained accordingly,

*Kelly* and *Channell* showed cause. The present question is of considerable importance, for as the mode of docketing judgments detailed by the officer is that usually adopted in K. B., much confusion may arise if it should turn out to be invalid, as contravening the statute. But the act is substantially complied with by the method here adopted; for the docket points out to the person searching for a judgment the place where he may find it. A docket is said to have been originally a mere index, invented by the courts for their own ease and the security of purchasers of lands, to avoid the trouble and inconvenience of turning over the rolls at large (*a*). Here the mortgagee, by using the docket as an index, would have found the number of the judgment roll, so as to have enabled the mortgagee to obtain the further desired information from the latter document. Though the prevailing practice of docketing judgments cannot vary the words of the statute, yet it may assist in pointing out the due construction of words merely directory; for if the precise mode directed by the act is held to be imperative, a mistake in the amount of damages or costs, or in the names, or an excess beyond the exact time for making the entries, would equally vitiate the whole. Before the statute, viz. in *Easter* 1657, a rule was made in K. B., requiring the plaintiffs' names to be entered alphabetically in a docket in that court.

[Lord *Lyndhurst* C. B. The object of the statute

(*a*) Tidd, 9th ed. 939.

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was, that all which the inquirer wished to find should appear on the docket, without putting him to a further inquiry elsewhere for the judgment; and it appears, that in this court, as well as in the Common Pleas, the precise course appointed by the act has been followed, and that the judgments are fully docketed. This entry conveys no information that the judgment has ever been entered, and only directs a search elsewhere, to ascertain whether a judgment has ever been obtained.]

But, secondly, this defendant is not in a situation to object to the judgment as insufficiently docketed. The defendant, as committee of the lunatic's estate, is *quoad* this action identified with him as judgment debtor. If so, he was bound by the judgment obtained against the lunatic by *Hopwood;* for the statute which requires the docket is expressly confined to the protection of mortgagees and purchasers. Nor is there evidence that interest was in arrear on the mortgage, or that notice of the mortgage was given by the mortgagee to the committee.

[Lord *Lyndhurst* C. B. The committee's duty was to pay the mortgage interest out of the first rents he might receive on aceount of the lunatic, without any notice; for as he is cognisant of the mortgage, his particular duty and situation make it unnecessary for him to have particular instructions or notice from the mortgagee to pay.]

*Jervis* and *Addison*, contrà. The statute is compulsory, and therefore the judgment, though carried in, is not duly docketed (*a*). Nor is the defendant in the condition of the lunatic, the original judgment debtor, for he is only agent to the Court of Chancery, and accountable accordingly: nor can he as such have received this money for the plaintiff's use, for he was

(*a*) See Tidd, 937. Sugden on Vendors, Appendix, 43. *Davis* v. *Strathmore*, 16 Ves. 419.

bound, in the first place, to pay off the mortgage. Then the legal estate is not in the tenant by elegit, nor in the plaintiffs as his assignees, but in the mortgagee, for the statute prevented it from passing to the former by the judgment. The committee is not identified with the mortgagor as his agent. Then, till he paid over the rents, he held them for the party lawfully entitled, viz. the mortgagee, *Pope v. Biggs* (*a*). Nor was the plaintiff, as assignee, entitled to the surplus rents received under the elegit exceeding the 70*l.* mortgage (*b*).

[*Bayley B.* In that case the mortgagee allowed the mortgagor to let, who therefore became landlord; notwithstanding which the mortgagee was held entitled to compel payment of rent to himself.]

Lord LYNDHURST C. B.—This rule must be made absolute. On considering the terms of the act, I think it is impossible to contend that this judgment has been properly docketed. All which was done in this instance was to docket the issue; that took place long before the judgment was carried in. The circumstance that nothing further was done as to docketing, is, in my opinion, sufficient to show that the judgment was not docketed; and if we were to hold that the present entry is sufficient, it would be tantamount to deciding that judgments need never be docketed. Then the title of the mortgagee having become the prior title, what was the duty of the defendant? The Court of Chancery appointed him to manage and administer the whole property of the lunatic, the judgment debtor, as his committee. Now when as such he received rents he was bound in the first place to protect the lunatic's property by keeping down the interest of the mortgages with the money thus arising; and that would be

(*a*) 9 B. & C. 245.

(*b*) See per *Parke* J. S. C.

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clearly the proper application of it in the first instance. Then such rents cannot be said to be exclusively the property of the assignee of the judgment creditor, or to be received to his use.

It has been said that it was not in evidence that any interest was in arrear on the mortgage; but it appears to me that in order to support this action for money had and received by the defendant to the use of the plaintiff, it was not sufficient to prove the sum of 18*l*. to have been received by the committee quâ rent of the lunatic's estate, but that the plaintiff should have gone on to show that it was received by the defendant to his own use, and that after the prior liabilities of the estate were discharged, a surplus sum remained in his hands. Here, though he might have shown that the interest on the mortgage was satisfied, he has not done so; and it is evident from the dates that more interest would be due to the mortgagee than that here sought to be recovered, as received by the defendant in his character of committee. That position being necessary to be made out in evidence by the plaintiff, and not having been established, he is not entitled to retain his verdict.

BAYLEY B. — The third section of statute 4 & 5 W. & M. c. 20. enacts, that no judgment "not docketed and entered in the books *as aforesaid*" shall affect any lands or tenements as to purchasers or mortgagees, or have any preference against heirs, executors or administrators, in their administration of their ancestor's, testator's or intestate's estates. Then has this judgment been docketed and entered within the meaning of the words *as aforesaid* in the above section? Now "the difficulty of finding out such judgments" is the mischief recited by the statute as that which it was intended by its means to obviate and to remedy it.

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The second section directs the officers of the courts to "make or cause to be made, and put into an alphabetical docket by the defendant's name, a particular of all judgments by confessions, &c. &c., which shall contain the name and names of the plaintiff and plaintiffs, the name and names of the defendant and defendants, his, her, or their place or places of abode, &c. if such be in the record of the judgment, and the debt, damages, and costs recovered thereby, and in what county, &c., the respective actions were laid, and the number roll of the entry thereof." This section applies to judgments by default or confession. Then follows a provision for making similar dockets in the cases of judgments on verdict, writ of enquiry, and demurrer. As to these the act directs particular officers named to carry in notes in writing, from which the proper persons may make out the dockets and perfect them in their docket books. The defect in this instance is, that the only docket entered is not a docket of the judgment, but of the issue only; and that on the face of that docket it cannot be ascertained without further search, and going to another roll, whether or not there ever was a judgment. Then if the judgment be not properly docketed, the subsequent mortgage conveys the legal estate of the property in question as a good and valid conveyance. So that if the legal estate is conveyed to the mortgagee, it is difficult to say on what the elegit is to attach as against him as so entitled. Had the money here sought to be recovered been even received by the lunatic himself, being the judgment debtor, I should have had great difficulty in saying that the action might be maintained; but the present defendant, so far from being identified with the lunatic as his committee, is in a very different position. He is not his agent or appointee; he is appointed by the Chancellor, to whom the king has delegated

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that care and custody of the lunatic's person and estates to which, *as parens patriæ*, he is entitled. The defendant then is committed under authority of the court of Chancery. On an application to that court, the lunatic's land is mortgaged for 1400*l.* and the committee executes the mortgage in the name of the lunatic. Thus, as far as 70*l.* a year extends, there is an incumbrance, to the liquidation of which the defendant must first attend, and would be negligent of at his peril. Whether, after discharging that amount, he might pay over the surplus to the plaintiff without the authority of the court of Chancery, is not necessary to be decided, but he is bound to keep down the interest of 70*l.* a year due on the mortgage. It is said that the rents were much more than adequate to that object; but where is the proof that they have been received? There is only evidence that 18*l.* 5*s.* 6*d.* has been received by the defendant, who was bound to pay over that sum to the mortgagee. The plaintiff has not made out his case, and a nonsuit must be entered.

GARROW B.—The act was passed to protect purchasers against dormant or unknown incumbrancers, and did not mean that the docket book should be a mere index to some other document, but that it should form a complete instrument for the purpose of showing at once whether a party had incumbered his lands and by what other judgments, before the purchaser entered into further negociation. The docket being bad, it follows that judgment of nonsuit must be entered.

VAUGHAN B.—In this action the assignees of a judgment creditor sue for rent, which they insist has been received by the defendant to their use. One question is, whether this judgment has been docketed in the manner required by law. The statute is a most

wholesome one, and full effect ought to be given to it. The preamble shows its plain object to be, to give purchasers that easy information of the entries of judgments which would render them safe, and it accordingly requires the docket to mention the names of the parties to the action, the description of the defendant if on the record, and the debt or damages and costs. The act does not say that a judgment not so docketed shall be void, but it distinctly says that it shall not affect subsequent purchasers or mortgagees. Now the officer's evidence shows that there is no docket of this judgment, but that the entry is nothing more than a docket of the issue, the amount of the debt &c., not having been brought in and entered on the roll. In *Hickey* v. *Haytor* (*a*), it was held that a debt on a judgment against a testator or intestate, not docketed according to the statute, must be postponed to a bond debt, and had no effect except as a simple contract debt; and I am clearly of opinion in this case the judgment can have no effect against the subsequent mortgage.

This sum appears to me to have been received, not to the use of the plaintiff, but to that of the mortgagee. Only a quarter's interest appears to have been received, which is much less than the sum which must have been in arrear.

Rule absolute.

(*a*) 6 T. R. 384.

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## GLASCOTT *against* CASTLE.

An attorney's bill will be referred to the Master to be taxed, though after it has been paid, if the motion be made in a reasonable time, though no fraud be imputed.

THE sheriff had paid costs on an attachment for not bringing in the body. A rule for referring the bill to be taxed by the Master was afterwards obtained. Cause was shown that the application was too late after payment of the costs, no fraud or gross overcharge being imputed.

BAYLEY B. said, that as the application had been made in a reasonable time, that rule did not apply, and that it was only where there had been delay that the motion must be supported by proof of fraud or imposition.

Rule absolute.

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## JAMES, Gent. *against* CHILD.

If a particular of demand, stating dates and items fully, exceeds three folios, and plaintiff gives notice to defendant accordingly under *Reg. Gen. Trin.* 1 *W.* 4. the court will order a full particular to be delivered to defendant on payment of the costs and taking short notice of trial, if necessary, though he may have had full particulars before the action was brought.

ASSUMPSIT for work and labour as a conveyancer. Plaintiff had delivered with the declaration a notice that the full particulars of his demand exceeded three folios (*a*), concluding by a general statement that his claim was for the sum of 58*l.* for conveyancing done between the 1 *January* 1822, and 1 *January* 1829. A summons for further and better particulars, stating dates and items, was taken out on an affidavit of the defendant, that to the best of his recollection and belief, he had not received any other bill except two

(*a*) See Reg. Gen. Trin. 1 W. 4. ante vol. 1. p. 521.

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bills annexed, which were general statements of the total of bills of law charges alleged to be done, and that it was necessary to his defence to have the particulars of the items. This was met by an affidavit produced on behalf of the plaintiff, that particulars of the items as well of the 58*l.* bill for conveyancing, as of the two other bills, had been fully furnished to the defendant some time ago. The learned Baron who was attended on the summons refused to make an order.

*Chilton* for defendant now moved for a rule to show cause why full particulars should not be delivered, which he said was the spirit of the new rule, whether the defendant had previously had an account rendered or not. The restriction to three folios was meant to save him the expense of a longer particular, if he had already had a full account.

*E. V. Williams* showed cause. The practice of this court was, that the defendant shall not have further particulars, unless on affidavit that he never had had them, or had mislaid them, or did not sufficiently know the demand so as safely to go to trial. Here the reverse appears, and a full particular of dates and sums has been delivered (*a*).

BAYLEY and VAUGHAN Bs. stated a like practice to have prevailed at chambers, and that short notice of trial was also imposed on defendant where necessary: for it might be that though the defendant had had the particulars of demand before the action brought, he might have mislaid them.

(*a*) See new Reg. Gen. Hil. 2 W. 4. s. 47. post.

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The court made the rule absolute on payment of costs of the particulars by the defendant, and refused to give the plaintiff the costs of the rule.

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NOLLEKEN *against* SEVERNE.

The pleading a plea before appearance, but within the number of days allowed for pleading, is not such an irregularity as entitles plaintiff to sign judgment before the time for pleading is out.

ON the 17th of *January* notice of declaration was served, indorsed to plead in eight days. On the 21st the defendant pleaded, though no appearance had been entered. Plaintiff signed judgment, treating the plea as a nullity. A rule having been obtained to set aside the judgment for irregularity,

*Archbold* showed for cause, that where the plea is a nullity either in respect of its form or the mode of pleading, it waives any further time for pleading which may remain; *Lockhart* v. *Mackreth* (*a*), *Perry* v. *Fisher* (*b*), *Brandon* v. *Pyne* (*c*).

[*Bayley* B.—The last case only shows a plea in abatement, after four days elapsed, dispensed with a rule to plead.]

*Follett* contrà. To plead before appearance entered, though irregular, does not entitle the plaintiff to sign judgment till the time for pleading is out.

*Per curiam.*—The judgment was signed too soon.

Rule absolute.

(*a*) 5 T. R. 663. (*b*) 6 East, 549. (*c*) 1 T. R. 689.

## The ATTORNEY-GENERAL *against* MUNDAY. 1832.

A term fee of 3*s*. 4*d*. is payable to a clerk in court in a revenue prosecution at suit of the attorney-general, though only a subpœna ad respondendum has issued, and no information has preceded, or subsequent step has taken place.

A MOTION had been made on the part of the Commissioners of stamps that the bill of a clerk in court might be referred back to the king's remembrancer to review his taxation. There were two questions: one, Whether a clerk in court is entitled to charge a term fee on a revenue information by the attorney-general where only a subpœna ad respondendum has issued, but no information has been previously filed or any subsequent proceedings had? The other, Whether the term fee of a clerk in court in a revenue cause is 3*s*. 4*d*. or 6*s*. 8*d*.?

These questions were discussed at great length on affidavits stating the contents of many old documents in the repositories of the court and the British Museum. It also appeared that in 1807 on the increase of the fees of the sworn clerks in Chancery, by order of the chancellor and master of the rolls, a table of fees of similarly increased amount had been prepared by the sworn clerks in the King's Remembrancer's Office, where the equity business of the exchequer is transacted, and had been laid before the Court of Exchequer. No order of the court thereon was produced, but the increased fees had been since received in many instances.

The judgments are all that is material to be further reported.

Lord LYNDHURST C. B.—The authority for issuing a *subpœna* in a revenue prosecution is the information, which is either filed or supposed to be filed; we are, therefore, of opinion, that where it is not filed, the officer is entitled to the term fee precisely in the same way as if it was actually filed at the time when it is supposed

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to be. The other question relates to the amount of the term fee. It was anciently 3*s*. 4*d*., and has never been altered by any competent authority, nor has the alleged change in fact to 6*s*. 8*d*. since 1807 been uniform, for it appears from the affidavits that the customs and excise boards have only paid 3*s*. 4*d*. as well during as before that period, and that such payments have been regularly acquiesced in. In addition to which, in 1822, when the commissioners for examining into the salaries of the officers of the courts of justice reviewed the proceedings of this court, they recommended that the old fee of 3*s*. 4*d*. should be continued. We are of opinion, therefore, that 3*s*. 4*d*. only should be taken as a term fee.

BAYLEY B.—I entirely agree that the fee is payable, and that it should be 3*s*. 4*d*. only. First, as to its being payable: the subpœna is issued on the presumption that an information has been previously filed, and it is conceded that if it had been so filed the term fee would have been payable. Now it is at the instance of the party by whom these costs are taxed and are to be paid, that the subpœna issues without filing the information. As to the amount, it is conceded that till 1807 its amount was 3*s*. 4*d*. only, and I am of opinion, that no competent authority has since altered it.

GARROW B. concurred.

VAUGHAN B.—As the process of subpœna imports that the information has been filed, it must be taken that a proceeding has been instituted, in respect of which the term fee is payable. The question therefore is simply on its quantum, and judges cannot be too vigilant that the taking improper fees does not by silent acquiescence become inveterate, so as to establish

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the appearance of a title to them. Now though the statute 3 G. 4. c. 69. empowers this court to make any alteration in them which they think proper, that authority has never been exercised. Then we are simply called on to say whether there is any authority to claim a term fee of 6*s*. 8*d*. in this instance, and we are of opinion that there is not, and that 3*s*. 4*d*. only can be taken.

Rule accordingly.

The *Attorney-General* and *Shepherd* for the commissioners of stamps.

*Jervis* and *Follett* for the clerk in court.

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## NOTTS *against* CURTIS.

In no case whatever can defendant change the venue after having obtained an order for time to plead, expressed to be granted "on the usual terms," but he may introduce a condition in the order to enable him to move for that purpose. Therefore, where a rule to change the venue had been obtained by the defendant in a country cause, against which it was shown for cause, that time to plead had been granted by a judge's order "on the usual terms:" the court amended the order on payment of costs, and changed the venue; for the judgment could not be delayed.

THE defendant had obtained a rule to change the venue from *Lincoln* to *Nottingham*, having previously had time to plead by a judge's order, expressed to be granted "on the usual terms."

*Miller* showed cause. The words, "on the usual terms," include an undertaking by the defendant not to move to change the venue. The books of practice (*a*) and *Waring* v. *Holt* (*b*) show that this is a general rule not affected by the question, Whether the plaintiff would be delayed, or a trial would be lost or not? It has been expressly adhered to in this court in *Waring* v. *Holt* and *Brettargh* v. *Deardon* (*c*), both of which

(*a*) Tidd's Pr. 9 ed. 609; Dax, 60. (*b*) 3 Pri. 3.
(*c*) 1 M. & Y. 106.

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were town causes; and in the first, the court refused to change the venue, though, to obviate the objection of the plaintiff, the defendant offered to give judgment of the term.

*Power* contrà in support of the rule. The doctrine relied on on the other side only applies to town causes, and the decisions cited proceeded on the delay occasioned to the plaintiff. No case shows that where the defendant has obtained time to plead on the usual terms, the plaintiff is entitled to retain the venue, unless he would be delayed in his judgment by the proposed change of it. There can be no reason for discharging this rule, for whether the venue be changed or not, the plaintiff, if successful, will obtain judgment at the same period.

Lord LYNDHURST C. B.—Though the cases cited were town causes, yet this court, in *Waring* v. *Holt*, laid it down as a general rule, that the defendant cannot change the venue after having obtained an order to plead "on the usual terms" generally expressed.—That rule has been adopted by the books of practice, and appears to have been always observed in this court. Now it is absolutely necessary that rules of practice should be uniformly adhered to till altered by competent authority, for otherwise it would be impossible for attornies to advise their clients in the due course of proceeding in causes. Here the defendant had it in his power to have drawn up the order specially, and to have inserted the exception "without prejudice to an application to change the venue;" but as the plaintiff will not be delayed, the order may be amended in that respect on payment of costs.

BAYLEY B.—If the defendant had applied to insert these words in the order, it would have been done as a

matter of course; then we may amend the order now, as the plaintiff will not be delayed, and no injury can result from the defendant having a few more days time to try.

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VAUGHAN B.—There can be no objection to this amendment taking place on payment of costs. I have repeatedly inserted this condition in orders for time to plead.

Order amended on payment of costs.

Rule absolute to change the venue.

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## GRAHAM *against* BROWN.

A plaintiff residing in any part of England, who sues a defendant resident in *Bath* in any other court than the court of requests established there by 45 G. 3. c. 67. and recovers less than 10*l*., may be deprived of his costs by suggestion on the roll.

ASSUMPSIT by indorsee against the acceptor of a bill of exchange, dated, drawn, and indorsed in *London*, in payment of a debt arising there, and accepted payable at a London banking-house. The plaintiff and the drawer lived in *London*, but the defendant resided in *Bath*, within the districts comprised in 45 G. 3. c. 67. (local,) which established a court of requests in that city and its liberties. At the London Sittings after last Michaelmas Term, the plaintiff had a verdict for 9*l*. and a rule was subsequently obtained for entering a suggestion on the roll, to deprive the plaintiff of costs, in pursuance of 45 G. 3. c. 67. s. 47. which deprives parties of costs who have sued in any other court whatsoever for a debt recoverable in the *Bath* court of requests, and recovered any sum under 10*l*.

*John Williams* and *Comyn* showed cause. The case

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of *Baildon* v. *Pitter* (*a*) ought not to prevail: the true meaning of the act is to compel plaintiffs residing in *Bath* and the adjacent districts there described, to sue in the court of requests there for debts due from parties resident within the same limits; for the legislature could not have intended that a plaintiff living at the extremity of the kingdom, and having a claim against a party resident in *Bath*, should be compelled to appear to be personally heard in the court of requests of that city to enforce his claim, at the hazard of being deprived of his costs, if he recovered less than 10*l*. in any other court. The preamble shows this to be the real object of the act. It recites that the city of *Bath* and the adjacent districts were connected in trade, and that the inhabitants were increased, and that the said city and the other parishes and places were situate at the extremity of the county of *Somerset*, and at a distance from the assize town, so that the inhabitants of the said city, &c. were obliged, for the purpose of recovering small debts at the assizes, to travel nearly sixty miles with thir witnesses. It then fixes the limits of the jurisdiction, and extends them beyond those provided by a former act. Then, though it is true that a plaintiff residing out of the jurisdiction *may*, by section 22, resort to this court, he is not *compelled* to do so. This argument is aided by the fact that there is no power to subpœna persons resident out of the jurisdiction of the court. Sect. 16, which gives a jurisdiction in actions of trespass, cannot be meant to include local actions of trespass, committed in any part of the kingdom by a resident of *Bath* or a party "living within" that city.

*Kelly*, contrà, was stopped by the court.

(*a*) 3 B. & Ald. 210.

Lord LYNDHURST C. B.—I see no difficulty in the construction of this act, though its policy is open to strong observation. By sect. 22. a plaintiff, wherever resident, may sue in the local court, and by the subsequent clause, sect. 47, costs are taken away from persons who have sued in any other court whatever for a debt *recoverable* in the court of requests. The inconvenience alluded to, that the plaintiff has not the power of subpœnaing witnesses resident out of the limits of the jurisdiction, equally applies to every court of local jurisdiction, and even to the superior courts themselves. It has been said that the act could not intend to include local actions of trespass, though the terms are general; but the words are, "actions of trespass or detinue for taking goods," so that that enactment is confined to transitory actions of trespass.

BAYLEY B.—We felt the hardship of the act in *Baildon* v. *Pitter*, but we could not escape from the express wording of its provisions. An early clause empowers a plaintiff to sue in this court of requests, though he may be resident out of its jurisdiction, and the 47th clause subsequently takes away costs from parties who have sued in another court for a cause of action recoverable in the *Bath* court of requests. We are, therefore, bound by the express words of the statute.

GARROW and VAUGHAN Barons, concurred.

Rule absolute (*a*).

(*a*) See on the *Bath* court of requests act, *Meredith* v. *Drew*, 8 Bing. R. 141; *Axon* v. *Dallimore*, 3 D. & R. 51; *Baildon* v. *Pitter*, 3 B. & Ald. 210; and *Dillamore* v. *Capon*, 1 Bing. 388, on 22 G. 2. c. 47. the *Southwark* act.

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A plea delivered after the time for pleading expressed, but before judgment has been actually signed, is regular; thus where a plea was so delivered, and plaintiff's attorney was informed thereof, but afterwards signed judgment, notwithstanding, it was set aside, with costs to be paid by him.

## AMPHLITT *against* SEMPLE.

A PLEA was delivered at the office of the plaintiff's attorney after the time for pleading was out, but before the judgment was actually signed. The plaintiff's attorney signed judgment after being informed of such delivery of a plea.

A rule was obtained to set aside the judgment, with costs to be paid by plaintiff's attorney, and the court made it absolute, saying, that it was signed with full knowledge of the circumstances, and that the plea was regular, if delivered before judgment was actually signed.

Rule absolute, as moved.

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## FLIGHT *against* BROWN.

A rule was granted to compute principal and interest on a bill of exchange lost since declaration thereon, on the terms of producing a copy before the master, with an affidavit that it was a true copy, and that there was no indorsement on the bill itself.

ASSUMPSIT by the drawer against the acceptor of a bill of exchange. The bill had been in the hands of the plaintiff's attorney up to the time of delivering the declaration, but was afterwards lost.—Notice of the motion had been served on the defendant, who was a prisoner, and had suffered judgment to go by default. No part of the bill had been paid.

*Hoggins* moved, under the above circumstances, to refer it to the master to compute principal and interest thereon.

The *Court* granted a rule, subject to the terms of

producing to the master a copy of the bill, verified by affidavit, and on its being also sworn that there was no indorsement on the bill itself (*a*).

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(*a*) See *Rolt* v. *Watson*, 12 B. M. 510; *Long* v. *Bailie*, 2 Camp. 214, n.; *Pooley* v. *Millard*, ante, Vol. I. 331; *Glover* v. *Thompson*, Ry. & M. 403.

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## HEWS *against* PYKE.

Where money has been paid into court in pursuance of 43 G. 3. c. 46. and 7 & 8 G. 4. c. 71. in lieu of putting in bail below and perfecting bail above, and plaintiff becomes entitled to take it out by having obtained a verdict, he can only issue execution for any surplus which he may have recovered.

THE defendant being arrested, deposited with the sheriff the amount for which he had been held to bail, with 10*l.* to answer the costs accruing up to the return of the writ; thus pursuing the course pointed out by 43 G. 3. c. 46. instead of putting in bail to the sheriff. The sheriff having paid that sum into court, the defendant, instead of perfecting bail above, paid into court an additional sum of 10*l.* as a further security for the costs of the action, and allowed the whole money thus deposited to remain in court to abide the event of the suit, pursuant to 7 & 8 G. 4. c. 71. s. 2. The plaintiff having got a verdict taxed the costs and issued execution for 160*l.*, under which he levied the whole damages and costs. On reviewing the taxation a deduction of 29*l.* was made from the costs. The defendant then moved for the costs of the motion to review, and also to set aside the levy to the amount of the sum in court. The whole was again referred to the master for his report; he reported that the plaintiff had no right to issue execution for the whole damages and costs, but was bound to have taken out of court the sum there deposited, and to levy for the difference only.

*Crowder* moved that the master should review his

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report, on the ground that the statute did not *compel* the plaintiff to take the sum deposited out of court, but gave him an election to do so or to issue execution for the whole damages and costs.

*Follett* showed cause in the first instance. The position advanced on the other side amounts to this, that even if the defendant had paid into court the whole sum ultimately recovered, the plaintiff might still take out execution against him. The extreme hardship of such a construction on defendants would be quite inconsistent with the object of these statutes passed to relieve them. Here the only person who could take out of court the sum deposited to abide the event of the suit was the plaintiff.

Lord LYNDHURST C. B.—If a plaintiff was entitled to pass by the money paid into court in pursuance of 43 G. 3. c. 46. and 7 & 8 G. 4 c. 71. and to issue execution for the whole damages and costs recovered, those statutes, which were intended to benefit defendants who had been arrested, would plunge them in greater hardships. For a defendant arrested for 1000*l.* would first have to deposit that sum in lieu of bail below, and after losing the verdict must find another like sum to avoid the execution, or must suffer his goods to be sold by the sheriff. Whereas no inconvenience can be suffered by the plaintiff, for he can at any time obtain the money out of court on motion, and would be entitled to the costs of that motion as costs in the cause. Then the words of the act directing the sum deposited in court to remain there "to abide the event of the suit," mean that the plaintiff, if entitled by success to take out that sum, is not only entitled but bound to resort to that sum pro tanto, and only to issue execution for a surplus.

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BAYLEY B.—I entirely agree. Were the act construed otherwise, the hardship on the defendant would be extreme, as execution might be levied on the defendant's goods for the whole sum recovered with costs, and the defendant might not be able to get his deposit paid back to him out of court in time to prevent the sale of any part of his goods.

The other Barons concurred.

Rule refused.

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MARSHALL *against* DAVISON.

An affidavit to hold to bail "for money paid, laid out and expended to and for the use of the defendant," is bad, for not stating that the money paid, &c. was so paid, &c. "at the request" of the defendant.

*HUMFREY* had obtained a rule nisi to discharge defendant out of custody on filing common bail for an alleged defect in the affidavit to hold to bail, which was "for money paid, laid out, and expended to and for the use of the defendant," without saying at his request.

*J. Jervis* showed for cause, that the plaintiff being a co-surety could legally hold him to bail, but could hardly swear that the money was paid "at his request."

*Per Curiam.*—The affidavit to hold to bail is bad. The rule must either be absolute without costs; or with costs, if the defendant undertakes to bring no action (*a*).

Rule absolute on the latter terms (*b*).

(*a*) In this and the next case *Bayley* B. intimated a doubt whether such action could be maintained.

(*b*) See *Visger* v. *Delegal*, 2 B. & Adol. 571; and *Fricks* v. *Poole*, 4 M. & R. 448.

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## KIRK *against* ALMOND.

Where a defendant had been arrested on an affidavit to hold to bail, founded upon three promissory notes, which was defective as to two of them, but was good on the third, for a bailable amount, the defendant was nevertheless discharged on filing common bail.

An affidavit to hold to bail by payee against the maker of a promissory note, must state when it was payable, or that it is due at a day past, and is yet unpaid.

THE affidavit to hold to bail stated, that the defendant was justly and truly indebted to plaintiff in the sum of 130*l.* and upwards on a certain promissory note drawn by defendant on 3 *December* 1826, and payable to the plaintiff or her order on demand, for the sum of 80*l.* and lawful interest; and on a certain other promissory note drawn by defendant on 7 *May* 1829, payable to the plaintiff or her order, for the sum of 30*l.* and lawful interest, and on a certain other promissory note drawn by the defendant on 7 *May* 1829, for the sum of 20*l.* and payable to the plaintiff or her order, with lawful interest. The affidavit did not proceed to state when the two last notes were payable, or that they were due or payable at a day now past and were yet unpaid.

A rule to discharge the defendant out of custody on filing common bail having been obtained on those grounds,

*Cresswell* showed cause. The two last notes must be taken to be payable on demand, and were therefore always due. Besides, the allegation that the defendant is justly indebted sufficiently shows them to be due and unpaid (*a*). It was for defendant to show that he was arrested for that sum; now he may have been arrested on this affidavit for the sum due on the first note only. That would form a bailable cause of action, without including interest, therefore the defendant ought to give bail for so much.

*Humfrey* contrà. It may turn out that a small sum was due on the good note; but the defendant is arrested for principal and interest due on all three. He cited *Jackson* v. *Yate* (*b*).

(*a*) But see per *A. Park*, J., 7 Bing. 252. (*b*) 2 M. & S. 148.

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*Per Curiam*—The affidavit says that the defendant is indebted to the plaintiff in the sum of 130*l.* and upwards; that is, in the aggregate amount of the three several notes mentioned therein when taken together. Substantially, therefore, the defendant is alleged to be indebted by virtue of all three of these instruments. The presumption must be, that he was arrested and is now in custody for the sum sworn to. Now as to the two last notes, he might equally be said to be justly and truly indebted thereon, if they were expressed not to be payable till a given period after their date, which had not elapsed; for that would be *debitum in præsenti, solvendum in futuro*. Then as to their contents, no right to arrest is shown. No case has been cited where an affidavit to hold to bail, which is partly good and partly bad, has been held good for the purpose of holding the defendant to bail.

Rule absolute for discharging the defendant on filing common bail.

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## LEWIS *against* GOMPERTZ.

An affidavit to hold to bail, which states a sum above 20*l.* to be due from defendant to plaintiff as indorsee of a bill of exchange, need not state the amount of the bill, but it must state *by whom* the bill was indorsed to the plaintiff.

THE affidavit to hold to bail stated defendant to be indebted to plaintiff in the sum of 100*l.* on a bill of exchange, accepted by the defendant and stated to be *duly indorsed* to the plaintiff, without stating *by whom*, or its amount.

On showing cause against a rule for discharging defendant from custody on filing common bail, *M'Taggart* v. *Ellice* (*a*), was cited as to the first point, and *Bosanquet* v. *Fillis* (*b*), on the second.

(*a*) 4 Bing. 114.

(*b*) 4 M. & S. 430.

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*Per Curiam.*—The affidavit should show on the face of it by whom it was indorsed, for the oath that it was "duly indorsed" deposes to a mere inference. As to the other objection, *Bayley* B. said he had looked at several cases where it must have occurred had it been tenable.

Rule absolute (*a*).

(a) See Tidd's Forms, 9th ed. 79, and *Buckworth* v. *Levy*, 7 Bing. 251.

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## NEALE *against* SWIND.

Where two parts of a contract originally existed, one of which was held by each party, and one part is afterwards lost, the court will order the other to be produced at the stamp office in order to its being stamped, though not held in trust for the applicant.

THE plaintiff had declared generally in debt for rent: after plea pleaded, a Baron made an order directing the defendant's attorney, *inter alia*, to produce an agreement for a lease at the stamp office to be stamped. Two parts of it had been executed by plaintiff and defendant, each taking a part, since which the plaintiff had lost his.

*Rotch* moved to rescind the above part of the order. The above facts distinguish this case from those where only one copy or part having originally been made, and being in the possession of one party, the Courts have ordered it to be inspected by the other (*b*). Here two parts originally existed, so that the defendant's part is his own, not held by him in trust for any other person; and he is not compelled to produce it against himself, *Street* v. *Brown* (*c*). Nor can the attorney

(*b*) *e. g. Bateman* v. *Phillips*, 4 Taunt. 157. *Pickering* v. *Noyes*, 1 B. & C. 262. *Portmore* v. *Goring*, 4 Bing. 152. *Ratcliffe* v. *Plumby*, 3 Bing. 148. *Gigner* v. *Bayley*, 5 B. M. 71. *Morrow* v. *Saunders*, 1 Brod. & B. 318.

(*c*) 6 Taunt. 302. 305, 1 Marsh. 610. *S. C.*

produce an instrument confidentially entrusted to him in that character.

BAYLEY B.(*a*)—That cannot affect the question, for we should enforce the production by the party himself. I have no doubt that we ought to enforce this order, and that the instrument must be produced at the stamp office to be stamped. All that is sought by this order is, that this instrument should be in such a condition at the time of the trial, that, if produced there by the defendant, in pursuance of a notice for that purpose from the plaintiff, it shall not nonsuit him for want of a stamp. For if so produced it would be the only evidence, and would exclude all other. Then such an order is essential to the purposes, and is founded on the common principles of justice.

GARROW B. concurred.

VAUGHAN B.—All that the plaintiff seeks is, that the defendant's attorney shall attend at the stamp office with this instrument, in order to its being stamped at the expense of the plaintiff: he does not seek to change its custody or even to inspect or read it. This order does not direct it to be produced at the trial, and may or may not be followed up by a notice to produce it there. Neither such production or giving secondary evidence of it, if not produced, are now under our consideration. Then where only one part of an instrument exists, and is not properly stamped, the court will enforce its production in order to its being stamped; though they will not grant a rule for its being inspected and copied, unless it is held by one party for the benefit of himself and the other, or in trust for such other.

Rule refused (*b*).

(*a*) Lord *Lyndhurst* had left the court.

(*b*) See *acc.* 6 Mod. 237.

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## BROWN *against* SHUKER and Others.

In an action against an heir on the bond of his ancestor, for performance of covenants in another indenture, riens per descent was pleaded, and the plaintiff replied under 3 & 4 W. & M. c. 14., that the defendant had lands in fee-simple by descent from his ancestor before the action commenced. The jury found a verdict for the plaintiff, and in pursuance of 3 W. & M. c. 14. s. 6. found the gross value of the lands descended. They then, in assessing damages on the breaches of covenant, (according to 8 & 9 W. 3. c. 11. s. 8.) fixed the amount at a larger sum than the value of the lands descended, as previously fixed by them:— Held, that execution for debt and costs could not be levied to a greater amount than the value of the lands descended.

DEBT against the defendants, as coheiresses, on the bond of their ancestor, conditioned to perform covenants in another indenture. First plea, *non est factum:* secondly, that the deed last mentioned in the condition was obtained by fraud: thirdly, that the defendants had not, nor had either of them, at the time of exhibiting the bill &c., nor at any time before or since, had any lands &c. by descent from their said father in fee-simple. Replication to third plea, that defendants and each of them, *after the death of their said father, and before the commencement of the suit, to wit,* on &c., had divers lands by descent from their father, to wit, at &c.; concluding with a verification and prayer for debt and damages for its detention. At the second (*a*) trial a verdict was found for the plaintiff and entered on record, under direction of *Patteson*, J., for 1*s.* damages for detention of the debt, and 40*s.* costs. Damages were assessed by the jury, on the assignment of breaches of the covenants in the other indenture, at 1265*l.*, and in pursuance of 3 W. & M. c. 14. s. 6. they found the gross value of the lands descended to be 486*l.* 8*s.* 6*d.* The master having taxed full costs to the plaintiff, a rule was obtained for reviewing his taxation.

*Jervis* and *Curwood* for the plaintiff, showed cause. The defendants contend that the plaintiff is not entitled to damages for detention of the debt, or to costs of suit. The point is new, and depends on the construction of 3 W. & M. c. 14. s. 5 & 6. (*b*) [*Bayley* B. In order to charge the heir with damages and costs, you must

(*a*) See the pleadings, &c. in this cause, Vol. I. p. 401.

(*b*) See similar provisions now in force, 11 G. 4. and 1 W. 4. c. 47. s. 6 & 7.

have a judgment against him with the clause *et si non, de bonis propriis.* Have you discovered any entry of such a judgment?] It is true that there is no instance in the books of entries of a conditional judgment against an heir *de bonis propriis,* where the lands taken by descent are insufficient to satisfy the claim against him on the specialty of his ancestor. But in an action on the simple contract of a testator against an executor, who pleads the general issue and *plene administravit,* if the plaintiff goes to trial on the first plea, taking judgment of assets *quando acciderint* on the other plea, he has judgment for damages and costs on the general issue *de bonis testatoris;* "et si non" *de bonis propriis; Marshall* v. *Wilder* (*a*): and though no entry of judgment against an heir against the land descended *et si non* de bonis propriis is to be found, yet he must be charged as for his own debt, viz. in the debet as well as the detinet; and before 16 & 17 C. 2. c. 8. it was error not so to declare (*b*). That takes away the necessity for such a judgment. Before the statute 3 W. & M. the heir, on pleading a false plea, was liable to pay costs de bonis propriis, though non est factum was held not to be such a plea. The object of the statute was not to exonerate heirs from the costs occasioned by their personally undertaking the defences of actions against them on the specialties of their ancestors, but to make them liable to the amount of land descended but aliened before action brought, and thus to prevent frauds on creditors by such alienations. The effect of the opposite construction would be to put the heir in a better situation by pleading falsely and going to trial, than if he let judgment go by default; in which case, by 3 W. & M. c. 14. s. 6. the judgment against him would be for the debt and damages, thus including the costs. As the replication here concludes with a prayer

(*a*) 9 B. & Cr. 655. (*b*) See cases collected 2 Saund. 7 *a.* n.

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of "damages on occasion of the detention," the award of damages would also be good. [*Bayley* B. If you are entitled to judgment for the debt and damages, the question remains for what amount of either execution may be levied. In cases of judgments by confession or on demurrer, the heir, not having pleaded riens per descent, admits assets to be descended, which in the absence of such a plea must be taken to exceed or amount to the debt and damages; but here, on a plea of riens per descent, the jury ascertain the value of the lands descended, and fix it at a limited amount.]

The judgment must be for the debt. The statute makes the heir liable to the debt, and, as a consequence, to damages and costs.

[Lord *Lyndhurst* C. B. Section 5 enacts, that execution shall be taken out upon any judgment obtained against such heir, (upon a specialty given by his ancestor, and binding him as heir,) *to the value of the said land*, as if the same were his own proper debt or debts. So far the liability of the heir is expressly confined to the value of lands descended. Next, in the 6th section it is provided, that, in a case like the present, execution shall be awarded "as aforesaid," *viz.* as in sect. 5; and the distinction between that case and one where judgment is given against the heir by confession is immediately drawn; for in the latter, execution is expressly given against the heir for the *debt and damages*, without writ to inquire of the lands, &c. descended. The act imposes on the heir a liability to judgment against him for debt and costs, precisely as if for his own debt, but only to the amount of the value of the land; so that the levy of execution on such a judgment is limited by sect. 6 of the statute to "as aforesaid," *viz.* to the "value of the lands."

[*Bayley* B. You were not obliged to reply under the statute, and might have adopted the common law

form, that the defendant hath, and at the time of exhibiting the bill had, sufficient lands by descent in fee-simple wherewith he could have satisfied the plaintiff's debt.]

*Campbell* and *R. V. Richards* contrà. As the land was here aliened before action brought, the defendant is not liable at common law, and it was necessary to rest the plaintiff's claim on the statute. Then what liability has the statute imposed on him? It created a liability not before existing, and conferred on specialty creditors of a deceased proprietor of land an advantage against the person of the heir which they did not before enjoy. Then the heir ought not to be liable in person any further than for the value of the lands descended, and the words of both sections expressly state that the heir is liable to that extent as for his proper debt.

BAYLEY B.—This question turns on the construction of sections 5 and 6 of 3 W. & M. c. 14. I have entertained no doubt on it, and Lord *Lyndhurst* before he left the court intimated to me that his opinion coincided with that of the other judges. Before the statute which has been referred to, if, before action brought, the heir aliened lands descended to him, he was not liable for the value of lands so aliened. Great mischief was thus occasioned to the creditors of the ancestor, who looked to his land for satisfaction of their demands. The statute altered the law in this particular, and the plaintiff here rests his case upon it. For section 6 enacts, "that the heir may plead riens per descent at the time of the original writ brought or bill filed against him;" and then that plaintiff may reply, that the heir had lands, &c. from his ancestor "before the original writ brought or bill filed." Now this replication is in the form here provided, und under it

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plaintiff would be entitled to execution of the lands of which the defendant's ancestor died seised, and which were aliened by him before action, which he could not do at common law. The section goes on to point out, as a consequence of adopting the replication specified by the statute, that if, on issue joined thereon, it be found for the plaintiff, the jury are to inquire of the value of the lands, &c. so descended. The neglect to do so on the first trial of this case occasioned a venire de novo here.

The statute next provides for the awarding of judgment and execution, by enacting, in sect. 6, "that thereupon judgment shall be given and execution shall be awarded *as aforesaid*." Those are words of reference which can only apply to section 5, by which, when the heir shall have aliened before any action brought, &c. he shall be answerable "to the value of the lands aliened." Even if these words "to the value of the lands aliened" apply to the debt, the subsequent proviso expressly directs the award of the execution: "and such execution shall be taken out on any judgment, &c. to the value of the said land, as if the same were his own proper debt or debts, &c. Then what is the form of the execution to be awarded after recovering on a judgment of this kind? The judgment may probably be entered up as for the proper debt of the heir, viz. for damages for detention of the debt, for costs of suit, and for costs *de incremento;* but when you come to take out the execution which the legislature intended against the heir, it is limited by the act to the value of the land descended, and to that value only. The language here used by the act may operate hardly, when, as in this instance, the lands descended are of a less value than the debt recovered; but it must be abided by till altered by competent authority, unless it is clear that something else was meant by the expressions used. It was con-

tended, that by analogy to the provision at the end of sect. 6, "that if judgment be given against the heir by confession or *nil dicit*, it shall be for the debt and damages," the same judgment must be given where the defendant pleads and has a verdict against him; for it was said that it would be strange that execution should be limited to the value of the lands aliened, if the heir, after putting a plaintiff to the expense of a trial, failed there; whereas, by the act, had he let judgment go by default, the execution would be general for debt and damages. And that is so, because the heir who suffers judgment by default does not state whether assets have descended or not(*a*), which is an admission that assets have descended equal in amount to the debt. The only form of entering up a judgment against an heir, which I have found applicable to the present case, is in *Tidd*'s Forms (*b*); and the plaintiff's counsel conceded, that from the time of passing the act of W. 3 to this day, there has been discovered no form of any judgment or execution of the nature contended for by them. Now there must have been forms of judgments for levying the debt, damages, and costs generally, had the heir been liable to a greater extent than the value of the lands descended. The form in *Tidd*'s Forms seems the proper one in such a case as this (*c*). On the whole I am of opinion, that though the statute entitles the plaintiff to recover the debt with the damages and costs against the heir, yet that the exe-

(*a*) See, if he shows the certainty of assets, Com. Dig. Pleader, (2 E. 5.) and see *id.* (2 E. 3.)

(*b*) 9th ed. 339.

(*c*) "Therefore it is considered that the said *A. B.* do recover against the said *C. D.* his said debt and his damages aforesaid *to* £——, *by the said jury in form aforesaid assessed*, and also £—— for his costs and charges aforesaid by the court of our said lord the king now here adjudged of increase to the said *A. B.*, and with his assent, 'to be levied of the lands and tenements which were of the said *E. F.* in fee-simple, &c.'"

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cution is limited to the value of the lands descended. The plaintiff may, perhaps, enter on the record a prayer of execution for debt, damages, and costs, and of our judgment that execution should issue for the same to the value of the land descended only, so that a court of error might review our opinion.

GARROW B. concurred.

VAUGHAN B.—At common law the heir was not liable if the lands descended were aliened by him before action brought. Since the statute, the heir who has aliened is in the same situation as if he had not, *viz.* he is liable to the value of the lands descended. For as this is a liability enacted by statute, we must see whether it is not also limited by the same statute. It was intended to give the creditor an advantage by sec. 5 which he had not before at common law, and at the same time to confine the extent to which execution is to be taken out. Again, the 6th section, which could have no application at common law, gives the creditor a replication, and again confines his execution, on the finding of the jury in his favour, to the same limit which was before defined in sec. 5. I agree with my brother *Bayley* in opinion, that where an heir, sued on the bond of his ancestor, suffers judgment by default or confession, it is reasonable to presume that assets had descended to an amount equal to or beyond the value of the debt sought to be recovered; in which case the execution as well as judgment ought to be general, viz. for the debt and damages. The judgment of the court therefore is, that execution shall be awarded to the value of the lands only.

Rule absolute.

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## HENRY BOYCE, GEORGE MILL, EDWARD WILLIAMS and SUSANNAH his Wife, *against* WILLIAM HANNING and Others.

By a marriage settlement certain premises were conveyed to trustees to the use of the husband and his assigns for life, remainder to trustees to preserve contingent remainders during his life, and after his death that the wife, if surviving, should receive the yearly charge of 25*l.* for her life, with power of appointment by them or the survivor to the use of one or more of the children *or remoter issue* of the tenant for life by his wife. In default of such appointment estates in fee were given to all the children of the marriage, but overridden by a power of sale by the trustees *for the time being*, with the consent in writing of the tenant for life and his wife or of the survivor of them, and after the decease of such survivor, *at the discretion of the trustees or trustee for the time being*. A subsequent clause provided for appointment of new trustees. The tenant for life and his wife joined with the trustees in a contract of sale and conveyance under the above power:—Held, that they could make a good title to the purchaser, notwithstanding the rule against perpetuities.

BY an order made by his Honor the Master of the Rolls in this cause on 18 *November* 1831, the following case was directed to be stated for the opinion of the barons of his Majesty's court of Exchequer.

The plaintiff *Edward Williams* being seised of or well entitled to a certain messuage, hereditaments, and premises called *Shortridge*, situate in the parish of *Buckland Brewer*, certain indentures of lease and release, bearing date on or about the 18th and 19th days of *December*, in the year 1828, the latter made between the said plaintiff *Edward Williams* of the first part, the plaintiff *Susannah*, now his wife, of the second part, and the plaintiffs *Henry Boyce* and *George Mill* of the third part, were duly executed by all the said parties, whereby the said plaintiff *Edward Williams* did convey unto the said plaintiffs *Henry Boyce* and *George Mill* and their heirs, the said messuage and tenement, hereditaments and premises, to hold to them and their heirs to uses, *viz.* until the solemnization of the said then intended marriage, to the uses then subsisting therein, and after the solemnization thereof, (and which event hath happened,) to the use of the said *Edward Williams* and his assigns during his life without impeachment of waste, with remainder to the use of the said plaintiffs *Henry Boyce* and *George Mill* and

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their heirs during the life of the said *Edward Williams*, in trust to preserve contingent remainders, and after the decease of the said plaintiff *Edward Williams*, then to the use, intent, and purpose that the said plaintiff, *Susannah* his wife, if then living, might receive the yearly charge of *25l.* per annum for her life, and subject thereto to the use of all or such one or more, (exclusively of the other or others of the children or remoter issue of the said plaintiff *Edward Williams* by the said plaintiff *Susannah* his wife,) at such times, for such estates and interests as the said *Edward Williams* and *Susannah* his wife should, as therein mentioned, jointly appoint, and in default of such joint appointment, then as the survivor of them should in manner therein mentioned appoint; and in default of such appointment and subject thereto, *To the use of all the children of the said* Edward Williams *by the said* Susannah *his wife, their heirs and assigns for ever, in equal shares as tenants in common;* and if any one or more of such children should die under *the age of twenty-one years* without leaving issue, then as to the share or shares of the child or children so dying, as well original as accruing by virtue of that provision, to the use of the other or others of the said children, and his, her, or their heirs and assigns for ever, if more than one, in equal shares as tenants in common; and if there should be no child of the said *Edward Williams* by the said *Susannah* his wife, or being such, if he or they should die under the age of twenty-one years without leaving issue, then to the use of the said plaintiff *Edward Williams*, his heirs and assigns for ever. And in the said indenture of release was contained a power for the said *Edward Williams* during his life, and after his death for the trustees or trustee for the time being, during the minority of any child or children of the said

marriage, who by virtue of the limitations therein should be entitled to any estate of inheritance in the said hereditaments, *to lease* all or any part of the said hereditaments for any term not exceeding twenty-one years; and a further power, which, so far as it is material, is in the words and to the purport and effect following; (that is to say): "Provided further, that it shall be lawful for the trustees or trustee for the time being, with the consent in writing of the said *Edward Williams* and *Susannah Mills*, or of the survivor of them, *and after the decease of such survivor at the discretion of the trustees or trustee for the time being, to sell* all or any part of the said hereditaments hereby appointed, granted, and released to any person or persons whomsoever, not excepting the said *Edward Williams* and *Susannah Mills*, for such price as to such trustees or trustee shall seem reasonable, and, for effecting such sale, by any deed by them or him legally executed, to revoke all or any of the uses, trusts, powers and premises herein declared and contained concerning the hereditaments so sold, and by the same or any other deed so executed to appoint any new uses, trusts or estates thereof." And by the said indenture it was provided, that the trustees or trustee for the time being should apply the money to arise by every such sale in or towards satisfaction of the principal sums of money, if any, then a charge upon the said premises, and to invest the surplus in the purchase of other freehold, leasehold, or copyhold hereditaments, to be settled to the same uses and under the same powers as are therein contained concerning the hereditaments so sold; and until the money should be so applied, to invest the same in government or real securities. And by the said indenture it was further provided, that after the decease of the said *Edward Williams*, and until his child or children, by the said plaintiff, *Susannah* his

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wife, should be of the age of twenty-one years, the said trustees or trustee should apply the yearly rents and profits of the said hereditaments for or towards their maintenance and education: and that it should be lawful for the said trustees or trustee for the time being, after the decease of the said *Edward Williams*, or in his life time with his consent in writing, to raise out of the said hereditaments such sum as therein mentioned for every such child as aforesaid, and the issue of such child, and to apply the same for their advancement during their minority, as therein mentioned. And it was further provided, that the receipts of the trustees or trustee, for any money payable to them or him under the provisions thereinbefore contained, should effectually discharge the persons paying the same. And it was by the said indenture further provided, that as often as any of the present or subsequent trustees, or their or his heirs, executors, administrators or assigns, should die, or decline or become incapable to act, it should be lawful for the said *Edward Williams*, during his life, and after his decease for the said *Susannah* his wife, if living, and after the decease of both of them then for the surviving or continuing trustees or trustee, or his or their executors or administrators, by deed to appoint any new trustee or trustees, and all the trust estates then subject to the trusts aforesaid should be thereupon effectually vested in such new trustees or trustee, either solely or jointly with the surviving or continuing trustees or trustee, as occasion should require, to the uses and upon the trusts thereinbefore declared, or such of them as should be then subsisting, and that every new trustee should have all the powers of the trustee in whose room he should be substituted.

The plaintiffs have under the power of sale before set forth contracted with the defendants for the sale to

them of the before mentioned messuages and premises (*a*).

The question for the opinion of the Court was, Whether under the said power of sale the plaintiffs *Henry Boyce* and *George Mills*, with such consent of the other plaintiffs as required by the said power, could sell and make a valid assurance of the said premises to the said defendants.

*W. Rogers* for the plaintiffs. The defendants will contend that the power to sell being general in its terms, and collateral to the estate in fee previously limited to the children of the marriage, so that they could not get rid of it by suffering a recovery, is void by the rule of law against purpetuities; and that the springing use intended to defeat the estate in fee should have been limited in express terms to take effect within the time fixed by that rule. This question could never arise while the old practice of conveyancers to give estates tail to the children provided for by settlements continued; but as the modern course is to give them a fee with powers of sale, in order to preclude the necessity of their barring the entail by suffering a recovery, the point whether those powers are void for infringing the rule against perpetuities is new and of general importance.

The plaintiffs contend; first, That the power of sale is good *pro tanto*, as divisible and executed during the life of the tenant for life; or secondly, That the period within which the power is to be executed must be taken to be confined to the lives of the tenant for life and the minorities of the children of the marriage.

On the first point the court will not hold a power of

(*a*) To enforce this contract a bill for specific performance was filed and gave rise to the present case.

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sale void in its creation for infringing the rule against perpetuities, if it can be supported to a proper extent by any reasonable construction, its object being the alienation, not the tying up of property (*a*). [*Bayley* B. Though it enables the trustees to sell, it disables the owners in fee from so doing.] This power may be considered as in the nature of two distinct powers to be executed in one form at one period, viz. by the trustees with consent of the tenant for life during their lives, and in another form after his death at discretion of the trustees. If it is so divisible, no question arises on the second branch, and the first having been here acted upon by the original parties to whom the power was given, will enable the trustees to make a good title to the defendants. Such a power would clearly be good, where the estates previously limited to the children were estates tail only, for it was never supposed to be valid after the death of the tenant in tail, and the consequent extinction of the estate tail (*b*). Then in this case, the power may be held good as conferring on the original donee for life an authority to sell, and being, therefore, executory during his life, though after his decease it might be void by the rule against perpetuities. Had the power gone no further than to confer the power to sell during his life, it would have been confessedly good. Then why should it not be good as far as affects the person to whom it may be legally given, whether it be good or not afterwards as regards his heirs?

*Ware* v. *Polhill* (*c*) was a case of leasehold property bequeathed to trustees; there was a power to the trustees at any time with the consent of the persons

(*a*) See Sugden on Powers, 4th ed. 1826. p. 148.

(*b*) See Preston on Abstracts, 158.

(*c*) 11 Vesey 257. Explained Sugden on Powers, 4th ed. 146. 147.

entitled, or if they were minors, at their own discretion, to sell the leaseholds, and invest the proceeds in freehold property to the same uses to which the freehold and copyhold were devised, viz. to the son of the testator for life, remainder to his first son, and to the issue male of the body of such first son. The son of testator took the freeholds for life, and died leaving issue an infant son, who died during his minority and without issue. After the death of the tenant for life, the power was acted on by the quasi tenant in tail, who was then situated as the tenants in fee in this case are, and it was held that the grandchild having become entitled to the absolute interest in the leaseholds, the power was bad and could not be modelled at that time so as to make it good. But the question did not arise whether the power was good *pro tanto* during the life of the tenant for life; for it was with reference to the matter settled being leasehold, and, therefore taken by the grandchildren absolutely, though limited so as to create an estate tail in real property, that the court said the power could not be modified. Here the life estate and subsequent fee being distinct interests, the powers annexed to them are distinct also. The power of consenting to a sale is appendant to the life estate, as separately existing in the tenant for life, *Noel* v. *Lord Henley* (*a*). Nor could such consent be compelled, therefore it ought not to be destroyed because another similar power is annexed to the estate in fee subsequently limited.

*Routledge* v. *Dorrill* (*b*) shows a power is divisible so as to be good in part, and bad in part. In that case there were objects to be executed, some within and others without the rule against perpetuities. The power was to appoint among the children and grandchildren or issue of a marriage. The children or grand-

(*a*) M'Clell. & Y. 302. (*b*) 2 Ves. 35.

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children born during the lifetime of the husband or wife, on whose marriage the settlement was made, would of course be within the rule against perpetuities, while other grandchildren might be born without its limits. The power was held good, and its execution valid as to the objects which did not tend to a perpetuity, viz. where the appointment was to grandchildren born within the limits, but void as to others born without the limits. "There is no doubt (says *Arden* M. R.) that under this power, it was competent to the parties to have appointed among all the issue living at the death of either husband or wife, whether in the first, second or third degree, and though the words are not confined to grandchildren living at the death, yet as they might appoint to such as were then living, such appointment would be good."

2dly. If this power is not divisible, then, upon the fair construction of the whole deed, the period within which it is to be executed by the trustees is in fact confined to the life of the tenant for life and the minorities of the children, so that it would expire with the trust. Those words in the deed which empower the tenant for life and his wife, or the survivor of them, to appoint to their remoter issue, cannot control the general object of the deed. *Doe* d. *Budden* v. *Harris* (*a*). There is no purpose of the settlement for which the trustees are to do any act which extends beyond the minorities of the children, and the power of leasing is expressly confined within that limit. Nor is the power of sale given to the tenants for life or their heirs nominatim, but to the trustees for the time being. Both powers should therefore be construed alike. Then if it appears clearly that the objects of the trust are confined to a limited period, *viz.* during the minorities of the children, it is fair to argue that the power of the

(*a*) 2 D. & R. 36.

trustees was also confined in like manner. *Doe* d. *Budden* v. *Harris* was a devise of freehold in trust to secure an annuity to testator's wife for life, and then in trust for his children till each attained 21 years, and then among them as tenants in common. The trustees then had power to receive rents, invest surpluses, grant leases, "and, if they should think it advisable, to sell any part thereof *at any time after* testator's death." It was held that, notwithstanding the latter clause, the fee being expressly given to the children on attaining 21, the power of the trustees expired with the minority of the infants. [Lord *Lyndhurst* C. B. Suppose one of the children to have died under 21, leaving a child, what would become of the trusts?] They would be at an end, and that child would take the fee immediately. It appears from *Doe* v. *Harris* that the trust would be at an end. Though that case is on a will and not on a deed, and the limitation was expressly to the trustees till a particular period only, *viz.* till the children attained 21, it is in point for the purpose of this argument; for though the power was as general in its terms as the present, yet as the trusts were expressly limited to the period of the children's minorities, the power was held to be limited in like manner. In the case of a power overriding an estate tail, the power is never held to exist after the estate tail is barred. Then the power of the tenant for life and his wife to limit to remoter issue, so as to create an estate or trust enduring beyond the minorities, would be put an end to by their concurrence in this sale.

It used to be doubted whether a power to appoint to children was not in the nature of a trust which could not be released or destroyed. It is now held, that not being a trust, it may be released or extinguished by recovery, *Smith* v. *Death* (*a*).

(*a*) 5 Madd. 371.

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*Preston* for the defendants. The power of sale is entire, and being collateral to an estate in fee is void by the rule against perpetuities. None of the authorities cited establish the position that this power is divisible. In *Routledge* v. *Dorrill* the court did not hold that there were two distinct powers, or that the power there *sub judice* might be split into two branches, one of which might be supported while the other was void; but it was there considered that the whole power as such was good, the real question being confined to the mode of its *execution*, which was held good in part and bad in part. For in that case the appointment under the power was held good as to a child or grandchild alive at the time of its execution, though the power was general to appoint to children, grandchildren, or *issue*, and bad as far as it was executed in favour of any, the issue of the marriage, not living at the death of the surviving tenant for life. *Adams* v. *Adams* (*a*) affords a similar remark. In *Doe* v. *Harris* the question was simply, Whether the trustees had the legal fee? and the court held that they had not, recognizing the existence of the power, but deciding nothing on its validity or the contrary. This power is general, and continues in the trustees during all the minorities; it is therefore clearly void as tending to a perpetuity. Now if tenant for life had died leaving a son, who died a minor leaving issue, the two minorities might keep up the power of sale beyond a life or lives in being, nine months and 21 years. Nor can the power be divided or modelled. It is manifestly single and entire, not personal *quoad* these trustees, but one and the same, extending to all persons who might become trustees "for the time being," *viz.* to trustees for all time—becoming such under the clause of substitution contained in the settlement. The necessity for the consent

(*a*) Cowp. 651.

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of the tenant for life and his wife to an alienation during their lives, and after their deaths the discretion vested in the trustees, are only necessary modifications, in order to the execution of the same power under different circumstances. It cannot be reasonably argued that the power was intended to be confined by the deed to the legal period of limitation, for its words are quite unlimited, and in themselves furnish an answer. Nor can the power of leasing affect the power of sale, for the first is expressly confined to the life of the tenant for life and the minority of the children, while the power of sale is in larger and unambiguous terms. Had the trustees to uses (figuratively so called, but since the statute more properly called relessees to uses,) taken an estate only for the lives of the tenant for life and his wife, and had the power stopped there, it would have been good as to all lives in being at the time of the execution; or had it been expressed to be "during the minority" of the children, it might have been restrictive; but is here in fact unlimited.

Lord *Eldon*, in *Ware* v. *Polhill* (*a*), says, "Upon further consideration as to the leasehold estate, I think that power of sale is void, for it may travel through minorities for two centuries; and if it is bad to the extent to which it is given, you cannot model it to make it good:" and in *Lord Southampton* v. *Marquis of Hertford* (*b*) the trust was of a term during the respective minorities of the respective tenants for life, or in tail, in possession, &c. to receive and lay out the rents, &c. in stock, to accumulate for such persons as should, on the expiration of such minorities or death of the minors, be tenants in possession, or entitled to the rents, &c. *Ware* v. *Polhill*, and *Routledge* v. *Dorrill* having been cited, Sir *William Grant* M. R. said the trust

(*a*) 11 Ves. jun. 283. (*b*) 2 Ves. & B. 64.

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was altogether void, and cited the above expressions of Lord *Eldon* in *Ware* v. *Polhill*.

*Smith* v. *Death* was cited to show that the destruction of the power of appointment to the children and issue would carry with it the power of creating estates and trusts to endure beyond the minorities; but that case has been disapproved by Lords *Eldon* and *Redesdale* in *Dom. Proc.*; though *Badham* v. *Mee* (*a*) might have been cited in support of it.

In *Bristow* v. *Boothby* (*b*) the wife had a power to charge the estate if the husband survived her, and if all the children of the marriage died without issue: that power was held bad for too great remoteness, and because not merely collateral to the estate tail or only to take effect on its expiration, but contemplating and conferring an interest beyond it; *e. g.* if males died leaving no issue, or girls only, the limitation being to males in tail male, but to girls in tail general.

*Tollet* v. *Tollet* (*c*) was an ineffectual attempt to split a contingency, and make it good as to one branch and bad as to another. *Longhead* d. *Hopkins* v. *Phelps* and others (*d*), when it was held that an executory devise might be limited on two distinct contingencies, of which one was void as too remote, is very unlike this power, which cannot be personal, but is manifestly one and the same throughout, a contemplated succession of trustees. Then if this power is contrary to the rule against perpetuities, the court cannot insert words by constructive implication, so as to restrict what the parties intended to make unlimited.

*W. Rogers* in reply. At all events if the power is single in form, there are in terms separate distinct

(*a*) 7 Bing. 695. See also *West* v. *Burney*, 1 Russell & Mylne, 431.
(*b*) 2 Sim. & Stu. 465. (*c*) Ambler, 177, 194.
(*d*) 2 Sir W. Bla. 704.

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periods during which it is to be executed; one in the lives of the tenant for life and his wife, the other after their deaths; and all that need here be contended is, that the power is good as to the first donees. Nor are the trustees improperly termed trustees to uses, for during the existence of the tenants for life, which is the period in which the power was executed, they were trustees to preserve contingent remainders. No individuals or class of persons are here pointed out as objects of the power. The power of selling is the only thing contemplated, and the period at which that shall take place, whether within the limits of the rule against perpetuities or beyond them, must be indifferent to the settlor. This case is not analogous to those in which the avowed objects of the former are some within and others without those limits, but in which the latter are as much the objects of the settlor's consideration as the former, and in which, unless both classes were included, it need not appear to have been the settlor's intention to include any.

*Cur. adv. vult.*

The following certificate was afterwards sent:—

This case has been argued before us; we have considered it, and are of opinion that, under the said power of sale, the plaintiffs *Henry Boyce* and *George Mill*, with such consent of the said plaintiffs as required by the said power, can sell and make a valid assurance of the said premises to the said defendant.

LYNDHURST.
J. BAYLEY.
J. VAUGHAN.

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## DOE d. SNAPE *against* SNAPE and others.

Where a party has with others been made a defendant in ejectment, but is not in possession, his name will be struck out on motion, he undertaking to permit execution for any premises of which he might be possessed.

ONE of the several defendants in this ejectment made an affidavit that he was in possession of no part of the premises sued for.

*Manning* moved to strike out his name, and offered an undertaking on his part to suffer execution of *hab. fac. poss.* to issue for any part of the premises of which it might turn out he was in possession.

On these terms the court granted a rule absolute in the first instance.

# REGULÆ GENERALES.

*Hilary Term, 2 W. 4.*

## I.

WHEREAS it is expedient that the practice of the courts of King's Bench, Common Pleas, and Exchequer of Pleas, should, as far as possible, be rendered uniform: IT IS ORDERED, That the practice to be observed in the said courts, with respect to the matters hereinafter mentioned, shall be as follows; that is to say,—

### AUTHORITY TO PROSECUTE OR DEFEND.

1. Warrants of attorney to prosecute or defend shall not be entered on distinct rolls, but on the top of the issue roll.

2. A special admission of prochein amy or guardian, to prosecute or defend for an infant, shall not be deemed an authority to prosecute or defend in any but the particular action or actions specified.

### AFFIDAVIT.

3. No affidavit of the service of process shall be deemed sufficient if made before the plaintiff's own attorney, or his clerk.

4. An affidavit sworn before a judge of any of the courts of King's Bench, Common Pleas, or Exchequer, shall be received in the court to which such judge belongs, though not entitled of that court; but not in any other court, unless entitled of the court in which it is to be used.

5. The addition of every person making an affidavit shall be inserted therein.

6. Where an agent in town or an attorney in the country is the attorney on the record, an affidavit sworn before the attorney in the country shall not be received; and an affidavit sworn before an attorney's clerk shall not be received in cases where it would not be receivable if sworn before the attorney himself; but this rule shall not extend to affidavits to hold to bail.

### BAIL.

7. After *non pros*, nonsuit or discontinuance, the defendant shall not be arrested a second time without the order of a judge.

8. Affidavits to hold to bail for money paid to the use of the defendant, or for work and labour done, shall not be deemed sufficient unless they state the money to have been paid, or the work and labour to have been done, at the request of the defendant.

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9. No supplemental affidavit shall be allowed to supply any deficiency in the affidavit to hold to bail.

10. A variance between the *ac etiam* and the declaration, or the want of an *ac etiam*, where the defendant is arrested, shall not be deemed ground for discharging the defendant or the bail; but the bail bond or recognizance of bail shall be taken with a penalty or sum of forty pounds only.

### WRIT, WHEN AND HOW TO BE FILED.

11. When the rule to return a writ expires in vacation, the sheriff shall file the writ at the expiration of the rule, or as soon after as the office shall be open.

12. And the officer with whom it is filed shall endorse the day and hour when it was filed.

### BAIL.

13. If any person put in as bail to the action, except for the purpose of rendering only, be a practising attorney, or clerk to a practising attorney, the plaintiff may treat the bail as a nullity, and sue upon the bail bond as soon as the time for putting in bail has expired, unless good bail be duly put in in the mean time.

14. In the case of country bail, the bail piece shall be transmitted and filed within eight days, unless the defendant reside more than forty miles from *London*, and in that case within fifteen days after the taking thereof.

15. When bail to the sheriff become bail to the action, the plaintiff may except to them though he has taken an assignment of the bail bond.

16. It shall be sufficient, in all cases, if notice of justification of bail be given two days before the time of justification.

17. If bail either to the action or in error are excepted to in vacation, and the notice of exception require them to justify before a judge, the bail shall justify within four days from the time of such notice, otherwise on the first day of the ensuing term.

18. Notice of more bail than two shall be deemed irregular, unless by order of the court or a judge.

19. Affidavits of justification shall be deemed insufficient, unless they state that each person justifying is worth the amount required by the practice of the courts, over and above what will pay his just debts, and over and above every other sum for which he is then bail.

20. Bail, though rejected, shall be allowed to render the principal without entering into a fresh recognizance.

21. Bail shall only be liable to the sum sworn to by the affidavit of debt and the costs of suit, not exceeding in the whole the amount of their recognizance.

22. Bail shall be at liberty to render the principal at any time during the last day for rendering, so as they make such render before the prison doors are closed for the night.

23. A plaintiff shall not be at liberty to proceed on the bail bond pending a rule to bring in the body of the defendant.

24. No bail bond taken in *London* or *Middlesex* shall be put in suit, until after the expiration of four days; nor, if taken elsewhere, till after the expiration of eight days exclusive from the appearance day of the process.

25. The time allowed for excepting to bail put in upon a *habeas corpus* shall be twenty days.

26. A recognizance of bail in error shall be taken in double the sum recovered, except in case of a penalty; and in case of a penalty, in double the sum really due, and double the costs.

27. In ejectment, the recognizance of bail in error shall be taken in double the yearly value and double the costs.

### BAIL BOND, AND ACTION THEREON.

28. An action may be brought upon a bail bond by the sheriff himself in any court.

29. In all cases where the bail bond shall be directed to stand as a security, the plaintiff shall be at liberty to sign judgment upon it.

30. Proceedings on the bail bond may be stayed on payment of costs in one action, unless sufficient reason be shown for proceeding in more.

### APPEARANCE.

31. A defendant who has been served with process by original shall enter an appearance within four days of the appearance day, if the action is brought in *London* or *Middlesex*, or within eight days of the appearance day in other cases, otherwise the plaintiff may enter an appearance for him according to the statute; and any attorney who undertakes to appear shall enter an appearance accordingly.

### IRREGULARITY IN PROCESS AND PROCEEDINGS.

32. Where the defendant is described in the process or affidavit to hold to bail by initials or by a wrong name, or without a Christian name, the defendant shall not be discharged out of custody or the bail bond delivered up to be cancelled on motion for that purpose, if it shall appear to the court that due diligence has been used to obtain knowledge of the proper name.

33. No application to set aside process or proceedings for irregularity shall be allowed, unless made within a reasonable time, nor if the party applying has taken a fresh step after knowledge of the irregularity.

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34. If a party plead several pleas, avowries, or cognizances without a rule for that purpose, the opposite party shall be at liberty to sign judgment.

DECLARATION AND TIME FOR.

35. A plaintiff shall be deemed out of court unless he declare within one year after the process is returnable.

36. When the plaintiff declares against a prisoner, it shall not be necessary to make more than two copies of the declaration, of which one shall be served and another filed with an affidavit of service; upon the office copy of which affidavit a rule to plead may be given.

37. Where a cause has been removed from an inferior court, the rule to declare may be given within four days after the end of the term in which the writ is returned.

38. It shall not be necessary for a defendant in any case to give a rule to declare, except upon removal from inferior courts; but the plaintiff may have a rule for time to declare in the Court of Exchequer as well as in other courts.

39. A rule to declare peremptorily may be absolute in the first instance.

40. A declaration laying the venue in a different county from that mentioned in the process shall not be deemed a waiver of the bail.

41. It shall not be deemed necessary to express the amount of damages in a notice of declaration.

42. Where an amendment of the declaration is allowed, no new rule to plead shall be deemed necessary, whether such amendment be made of the same term as the declaration or of a different term.

PLEA AND TIME FOR.

43. A demand of plea may be made at the time when the declaration is delivered, and may be indorsed thereon.

44. If a defendant after craving *oyer* of a deed omit to insert it at the head of his plea, the plaintiff on making up the issue or demurrer book may, if he think fit, insert it for him, but the costs of such insertion shall be in the discretion of the taxing officer.

45. If the declaration be filed or delivered so late that the defendant is not bound to plead until the next term, the defendant may plead as of the preceding term, within the first four days of the next term, any plea to the jurisdiction or in abatement, or a tender, or any other similar plea.

46. The defendant shall not be at liberty to waive his plea without leave of the court or judge.

PARTICULARS.

47. A summons for particulars and order thereon may be obtained

by a defendant before appearance, and may be made, if the judge think fit, without the production of any affidavit.

48. A defendant shall be allowed the same time for pleading after the delivery of particulars under a judge's order, which he had at the return of the summons; nevertheless, judgment shall not be signed till the afternoon of the day after the delivery of the particulars, unless otherwise ordered by the judge.

### NOTICES AND RULES AND SERVICE THEREOF.

49. Where the residence of a defendant is unknown, notice of declaration may be stuck up in the office, but not without previous leave of the court.

50. Service of rules and orders, and notices, if made before nine at night, shall be deemed good, but not if made after that hour.

51. It shall not be necessary to the regular service of a rule, that the original rule should be shown, unless sight thereof be demanded, except in cases of attachment.

52. Where a term's notice of trial or inquiry is required, such notice may be given at any time before the first day of term.

53. A rule to reply may be given at any time when the office is open.

54. Service of a rule to reply, or plead any subsequent pleading, shall be deemed a sufficient demand of a replication, or such other subsequent pleading.

### PAYMENT OF MONEY INTO COURT.

55. In all cases in which money may be paid into court, leave to pay it in may be obtained by a side bar rule.

56. On payment of money into court, the defendant shall undertake by the rule to pay the costs, and in case of non-payment, to suffer the plaintiff either to move for an attachment, on a proper demand and service of the rule, or to sign final judgment for nominal damages.

### TRIAL AND NOTICE THEREOF.

57. Notice of trial and inquiry, and of continuance of inquiry, shall be given in town, but countermand of notice of trial, or inquiry, may be given either in town or country, unless otherwise ordered by the court, or a judge.

58. The expression "short notice of trial" shall, in country causes, be taken to mean four days.

59. In all cases where the plaintiff in pleading concludes to the country, the plaintiff's attorney may give notice of trial at the time of delivering his replication, or other subsequent pleading, and in case issue shall afterwards be joined, such notice shall be available; but if issue be not joined on such replication, or other subsequent

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pleading, and the plaintiff shall sign judgment for want thereof, and forthwith give notice of executing a writ of inquiry, such notice shall operate from the time that notice of trial was given as aforesaid; and in all cases where the defendant demurs to the plaintiff's declaration, replication, or other subsequent pleading, the defendant's attorney, or the defendant, if he plead in person, shall be obliged to accept notice of executing a writ of inquiry on the back of the joinder in demurrer; and in case the defendant pleads a plea in bar or rejoinder, &c. to which the plaintiff demurs, the defendant's attorney, or the defendant, if he plead in person, shall be obliged to accept notice of executing writ of inquiry on the back of such demurrer.

60. Notice of a trial at bar shall be given to the proper officer of the court before giving notice of trial to the party.

61. In country causes, or where the defendant resides more than forty miles from town, a countermand of notice of trial shall be given six days before the time mentioned in the notice for trial, unless short notice of trial has been given.

62. In town causes where the defendant lives within forty miles of town, two days' notice of countermand shall be deemed sufficient.

63. The rule for a view may in all cases be drawn up by the officer of the court, on the application of the party, without affidavit, or motion for that purpose.

### NEW TRIAL, MOTION IN ARREST OF JUDGMENT.

64. If a new trial be granted without any mention of costs in the rule, the costs of the first trial shall not be allowed to the successful party, though he succeed on the second.

65. No motion in arrest of judgment, or for judgment *non obstante veredicto*, shall be allowed after the expiration of four days from the time of trial, if there are so many days in term, nor in any case after the expiration of the term, provided the jury process be returnable in the same term.

### JUDGMENT AND TIME FOR SIGNING.

66. Judgment for want of a plea after demand may in all cases be signed at the opening of the office in the afternoon of the day after that on which the demand was made, but not before.

67. After the return of a writ of inquiry, judgment may be signed at the expiration of four days from such return, and after a verdict, or nonsuit, on the day after the appearance-day of the return of the *distringas*, or *habeas corpora*, without any rule for judgment.

### JUDGMENT AS IN CASE OF NONSUIT.

68. A rule *nisi* for judgment as in case of a nonsuit may be obtained on motion without previous notice, but in that case it shall not operate as a stay of proceedings.

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69. No motion for judgment as in case of a nonsuit shall be allowed after a motion for costs for not proceeding to trial for the same default, but such costs may be moved for separately, (*i. e.*) without moving at all for judgment as in case of a nonsuit, or after such motion is disposed of: or the court on discharging a rule for judgment as in case of a nonsuit may order the plaintiff to pay the costs of not proceeding to trial, but the payment of such costs shall not be made a condition of discharging the rule.

70. No entry of the issue shall be deemed necessary to entitle a defendant to move for judgment as in case of a nonsuit, or to take the cause down to trial by proviso.

71. No trial by proviso shall be allowed in the same term in which the default of the plaintiff has been made, and no rule for a trial by proviso shall be necessary.

### WARRANT OF ATTORNEY AND COGNOVIT.

72. No warrant of attorney to confess judgment, or *cognovit actionem*, given by any person in custody of a sheriff or other officer upon mesne process, shall be of any force, unless there be present some attorney on behalf of such person in custody expressly named by him, and attending at his request, to inform him of the nature and effect of such warrant or cognovit, before the same is executed, which attorney shall subscribe his name as a witness to the due execution thereof, and declare himself to be attorney for the defendant, and state that he subscribes as such attorney.

73. Leave to enter up judgment on a warrant of attorney, above one and under ten years old, must be obtained by a motion in term, or by order of a judge in vacation; and if ten years old or more, upon a rule to show cause.

### COSTS.

74. No costs shall be allowed on taxation to a plaintiff upon any counts or issues upon which he has not succeeded; and the costs of all issues found for the defendant shall be deducted from the plaintiff's costs.

### EXECUTION.

75. It shall not be necessary that any writ of execution should be signed; but no such writ shall be sealed till the judgment-paper, postea, or inquisition, has been seen by the proper officer.

76. A writ of *habere facias possessionem* may be sued out without lodging a *præcipe* with the officer of the court.

77. In actions commenced by bill a *ca. sa.* to fix bail shall have eight days between the teste and return, and in actions commenced by original fifteen, and must in *London* and *Middlesex* be entered four clear days in the public book at the sheriff's office.

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SCIRE FACIAS.

78. A plaintiff shall not be allowed a rule to quash his own writ of *scire facias*, after a defendant has appeared, except on payment of costs.

79. A *scire facias* to revive a judgment more than ten years old shall not be allowed without a motion for that purpose in term, or a judge's order in vacation, nor if more than fifteen without a rule to show cause.

80. A *scire facias* upon a recognizance taken in Serjeants' Inn, or before a commissioner in the country, and recorded at *Westminster*, shall be brought in *Middlesex* only, and the form of the recognizance shall not express where it was taken.

81. No judgment shall be signed for non-appearance to a *scire facias* without leave of the court or a judge, unless the defendant has been summoned; but such judgment may be signed by leave after eight days from the return of one *scire facias*.

82. A notice in writing to the plaintiff, his attorney or agent, shall be a sufficient appearance by the bail or defendant on a *scire facias*.

ERROR.

83. A writ of error shall be deemed a *supersedeas* from the time of the allowance.

84. To entitle bail to a stay of proceedings pending a writ of error, the application must be made before the time to surrender is out.

SUPERSEDEAS.

85. The plaintiff shall proceed to trial or final judgment against a prisoner within three terms inclusive after declaration, and shall cause the defendant to be charged in execution within two terms inclusive after such trial or judgment; of which the term in or after which the trial was had shall be reckoned one.

86. The marshal of the King's Bench prison, and the warden of the Fleet, shall present to the judges of the courts of King's Bench, Common Pleas, and Exchequer, in their respective chambers at *Westminster*, within the first four days of every term, a list of all such prisoners as are supersedable; showing as to what actions and on what account they are so, and as to what actions (if any) they still remain not supersedable.

87. If by reason of any writ of error, special order of the court, agreement of parties, or other special matter, any person detained in the actual custody of the marshal of the King's Bench prison or warden of the Fleet, be not entitled to a supersedeas or discharge to which such prisoner would, according to the general rules and practice of the court, be otherwise entitled, for want of declaring, proceeding to trial or judgment, or charging in execution, within the

times prescribed by such general rules and practice, then and in every such case the plaintiff or plaintiffs at whose suit such prisoner shall be so detained in custody, shall, with all convenient speed, give notice in writing of such writ of error, special order, agreement, or other special matter, to the marshal or warden, upon pain of losing the right to detain such prisoner in custody by reason of such special matter; and the marshal or warden shall forthwith after the receipt of such notice cause the matter thereof to be entered in the books of the prison, and shall also present to the judges of the respective courts from time to time a list of the prisoners to whom such special matter shall relate, showing such special matter together with the list of the prisoners supersedable.

88. All prisoners who have been or shall be in the custody of the marshal or warden for the space of one calendar month after they are supersedable, although not superseded, shall be forthwith discharged out of the King's Bench or Fleet prison as to all such actions in which they have been or shall be supersedable.

89. The order of a judge for the discharge of a prisoner on the ground of a plaintiff's neglect to declare, or proceed to trial, or final judgment, or execution in due time, may be obtained at the return of one summons served two days before it is returnable, such order in town causes being absolute, and in country causes, unless cause shall be shown within four days, or within such further time as the judge shall direct.

90. A rule or order for the discharge of a debtor who has been detained in execution a year for a debt under twenty pounds, may be made absolute in the first instance, on an affidavit of notice given ten days before the intended application, which notice may be given before the year expires.

### ATTORNEY AND HIS BILL.

91. An order to deliver or tax an attorney's bill may be made at the return of one summons, the same having been served two days before it is returnable.

92. One appointment only shall be deemed necessary for proceeding in the taxation of costs, or of an attorney's bill.

93. No set-off of damages or costs between parties shall be allowed to the prejudice of the attorney's lien for costs in the particular suit against which the set-off is sought, provided, nevertheless, that interlocutory costs in the same suit awarded to the adverse party may be deducted.

### MISCELLANEOUS.

94. It shall not be necessary that a *pluries capias* be stamped by the clerk of the warrants, to authorize the exigenter to make out an exigent. Pluries capias.

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95. In order to charge a defendant in execution, it shall not be necessary that the proceedings be entered of record.

96. Side-bar rules may be obtained on the last as well as on other days in term.

Enlarging rule.

97. A rule may be enlarged, if the court think fit, without notice.

Security for costs.

98. An application to compel the plaintiff to give security for costs must in ordinary cases be made before issue joined.

Compounding penal action.

99. Leave to compound a penal action shall not be given in cases where part of the penalty goes to the crown, unless notice shall have been given to the proper officer, but in other cases it may.

Withdrawing plea after confessing action.

100. Where the defendant, after having pleaded, is allowed to confess the action, he may withdraw his plea in person without the appearance of the attorney or his clerk for that purpose before the officer of the court.

Good jury.

101. There shall be no rule for the sheriff to return a good jury upon a writ of inquiry, but an order shall be made by a judge upon summons for that purpose.

Inspection of court rolls.

102. An order upon the lord of a manor to allow the usual limited inspection of the court rolls, on the application of a copyhold tenant, may be absolute in the first instance upon an affidavit that the copyhold tenant has applied for and been refused inspection.

Changing venue

103. In cases where the application for a rule to change the venue is made upon the usual affidavit only, the rule shall be absolute in the first instance; and the *venue* shall not be brought back except upon an undertaking of the plaintiff to give material evidence in the county in which the *venue* was originally laid.

Payment of money into court in actions which are consolidated.

104. Where money is paid into court in several actions which are consolidated, and the plaintiff, without taxing costs, proceeds to trial on one and fails, he shall be entitled to costs on the others up to the time of paying money into court.

Continuances.

105. After judgment by default, the entry of any subsequent continuances shall not be required.

Discontinuance.

106. To entitle a plaintiff to discontinue after plea pleaded, it shall not be necessary to obtain the defendant's consent, but the rule shall contain an undertaking on the part of the plaintiff to pay the costs, and a consent, that if they are not paid within four days after taxation, defendant shall be at liberty to sign a *non pros* (*a*).

Counsel's signature to pleadings.

107. It shall not be necessary that any pleadings which conclude to the country be signed by counsel.

Rule to rejoin.

108. In all special pleadings, where the plaintiff takes issue on the defendant's pleading, or traverses the same, or demurs, so that the defendat is not let in to allege any new matter, the plaintiff may proceed without giving a rule to rejoin.

Imparlance roll.

109. It shall not be necessary that imparlances should be entered on any distinct roll.

(*a*) No terms as to not bringing any action.

110. Where a pauper omits to proceed to trial, pursuant to notice, or an undertaking, he may be called upon by a rule to show cause why he should not pay costs though he has not been dispaupered.

II.

AND IT IS FURTHER ORDERED, That upon every bailable writ and warrant, and upon the copy of any process served for the payment of any debt, the amount of the debt shall be stated, and the amount of what the plaintiff's attorney claims for the costs of such writ or process, arrest, or copy and service and attendance to receive debt and costs, and that upon payment thereof, within four days, to the plaintiff or his attorney, further proceedings will be stayed. But the defendant shall be at liberty, notwithstanding such payment, to have the costs taxed: and if more than one sixth shall be disallowed, the plaintiff's attorney shall pay the costs of taxation.

The indorsement shall be written or printed in the following form:—

"The plaintiff claims —— for debt, and —— for costs. And if the amount thereof be paid to the plaintiff or his attorney within four days from the service hereof, further proceedings will be stayed."

III.

AND IT IS FURTHER ORDERED, That in *Hilary* and *Trinity* terms, a plaintiff in any country cause may file or deliver a declaration *de bene esse*, within four days after the end of the term, as of such term.

IV.

AND IT IS FURTHER ORDERED, That the rules heretofore made in the court of King's Bench and Common Pleas respectively, for avoiding long and unnecessary repetitions of the original writ in certain actions therein mentioned, shall be extended and applied to the courts of King's Bench, Common Pleas, and Exchequer of Pleas, to all personal and mixed actions; and that in none of such actions shall the original writ be repeated in the declaration, but only the nature of the action stated, in manner following: viz. *A. B.* was attached to answer *C. D.* in a plea of trespass, or in a plea of trespass and ejectment, or as the case may be, and any further statement shall not be allowed in costs.

V.

AND IT IS FURTHER ORDERED, That upon staying proceedings, either upon an attachment against the sheriff for not bringing in the body, or upon the bail-bond, on perfecting bail above, the attachment or bail-bond shall stand as a security, if the plaintiff shall have declared *de bene esse, and* shall have been prevented for want of special bail being perfected in due time from entering his cause for trial, in a town cause in the term *next after* (*a*) *that in which the writ is returnable*, and in a country cause at the ensuing assizes.

(*a*) See Tidd, 9 ed. 303. Semb. not altering *Bevan* v. *Knight*, 1 Tyr. 420.

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REGULÆ GENERALES.

VI.

AND IT IS FURTHER ORDERED, That the expense of a witness called only to prove the copy of any judgment, writ, or other public document, shall not be allowed in costs, unless the party calling him shall, within a reasonable time before the trial, have required the adverse party, by notice in writing, and production of such copy, to admit such copy, and unless such adverse party shall have refused or neglected to make such admission.

VII.

AND IT IS FURTHER ORDERED, That the expense of a witness called only to prove the handwriting to, or the execution of, any written instrument stated upon the pleadings, shall not be allowed, unless the adverse party shall, upon summons before a judge, a reasonable time before the trial, (such summons stating therein the name, description, and place of abode of the intended witness,) have neglected or refused to admit such handwriting or execution, or unless the judge, upon attendance before him, shall indorse upon such summons, that he does not think it reasonable to require such admission.

VIII.

AND IT IS FURTHER ORDERED, That in all cases in which any particular number of days, not expressed to be clear days, is prescribed by the rules or practice of the courts, the same shall be reckoned exclusively of the first day and inclusively of the last day, unless the last day shall happen to fall on a *Sunday*, *Christmas-day*, *Good-Friday*, or a day appointed for a public fast or thanksgiving, in which case the time shall be reckoned exclusively of that day also.

AND IT IS FURTHER ORDERED, That the above rules shall take effect on the first day of next *Easter* term.

| | |
|---|---|
| TENTERDEN. | J. VAUGHAN. |
| N. C. TINDAL. | J. PARKE. |
| LYNDHURST. | W. BOLLAND. |
| J. BAYLEY. | J. B. BOSANQUET. |
| J. A. PARK. | W. E. TAUNTON. |
| W. GARROW, | E. H. ALDERSON. |
| J. LITTLEDALE. | J. PATTESON. |
| S. GASELEE. | |

## MEMORANDUM.

Shortly after this term Mr. Baron *Garrow* resigned his seat in this court, and was succeeded by *John Gurney*, Esq. *K. C.* who, having been raised to the degree of the Coif, took the oaths and his seat on the 2d day of *Easter* term, and was afterwards knighted.

# REPORTS OF CASES

ARGUED AND DETERMINED IN THE

# COURTS OF EXCHEQUER OF PLEAS,

AND

# EXCHEQUER CHAMBER,

IN

# Easter Term,

IN THE SECOND YEAR OF THE REIGN OF WILLIAM IV.

---

## REGULA GENERALIS.

17 *April* 1832.

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WHEREAS by one of the rules made in *Hilary* term last past, (*ante*, p. 342. pl. 10.) it was amongst other things ordered, that the want of an *ac etiam* where a defendant is arrested shall not be deemed ground for discharging the defendant or the bail, but the bail-bond or recognizance of bail shall be taken with a penalty or sum of 40*l.* only; and whereas it was not intended that the said rule should apply to writs of *quo minus*, or to other writs which heretofore have never had an *ac etiam* clause: It is therefore hereby declared and ordered, that the said part of the said rule shall extend to those writs only in which there has heretofore been an *ac etiam* clause.

Signed by All the Judges of the Courts of Common Law.

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BETWEEN

*George Jackson* and *Ann Nesbitt*, his wife (since deceased) . . . . . Plaintiffs.

AND

Sir *Charles Forbes*, Bart. *Lachlan Macquarie* (since deceased), *Colin Anderson* (since deceased), and *Caroline Erskine*, late an infant, by her guardian, . . . . . Defendants.

AND BETWEEN

The said *G. Jackson* and *A. N.* his wife, Plaintiffs.

AND

The said *L. Macquarie*, (since deceased) Defendant.

AND BETWEEN

The said *G. Jackson* and *A. N.* his wife, Plaintiffs.

AND

*Thomas Falkner Middleton* and *Caroline Erskine* his wife, late *C. E. Anderson*, an infant, *George Jackson Jackson* and *John Anderson Jackson*, infants, by their guardian, and the said Sir *C. Forbes*, Bart. and *L. Macquarie* (since deceased), Defendants.

AND BETWEEN

The said *G. Jackson* . . . . . Plaintiff.

AND

The said Sir *C. Forbes*, Bart. *T. F. Middleton* and *C. E.* his wife, and *G. J. Jackson*, *J. A. Jackson*, and *J. Jackson*, children of the said plaintiff *G. Jackson*, all infants out of the jurisdiction of the court, *J. H. Forbes*, *M. Hale*, and His Majesty's Attorney-General, . . . . . Defendants.

By original and supplemental Bills and bill of revivor.

A testator born in Scotland, but having resided many years in India as a

ON the hearing in the court of Chancery, on 16 *February* 1831, the Lord Chancellor *Brougham* directed the following case to be sent for the opinion of the Court of Exchequer.

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*Colin Anderson*, late surgeon to his Majesty's 75th regiment of foot, deceased, was a native of *Scotland*, and was in his lifetime and at the time of his death seised and possessed of and otherwise well entitled to some real estate in the *East Indies*, and was also possessed of considerable personal estate and effects, all of which, at the time of his death and of making his will and codicils hereinafter stated, were also in India.

The testator was for some time before and until his death resident in India, and being seised and possessed as aforesaid, duly made and published his last will in writing, bearing date the 25th of *October* 1802, and thereby desired that his house and grounds in the island of *Coolabah*, together with his household furniture, horses, liquors, &c. might be sold at public outcry to the highest bidder, and the produce placed to the credit of his estate; and after noticing that on the 1st of *January* 1802, he should have assets in India to the amount therein mentioned, and that he was entitled to any other division of prize money which might thereafter be made for *Columbo* and *Seringapatam* as captain, and as major for *Cochin* prize-money, and to whatever might be given to the captors of *Kurree*, on both which services he was head surgeon; and also noticing that there was one boy at home named *Colin Anderson*, born on or about the 25th day of *October* 1788, then at school at *Glasgow*, and boarded with Mr. *John M'Arthur*, tailor, there: that there was one girl in India named *Jane Jarvis Anderson*, born at *Poondamalee*, near *Madras*, on the 2d day of *October* 1797: that there was one girl in India born at *Mangalore* on the 21st day of *September*, 1800,

surgeon of one of the king's regiments, died there, leaving real and personal property situated in India, but no assets in England. By his will and testamentary papers, he left the whole of his property in equal divisions to his four natural children, or the survivors of them, and their heirs, subject to some small legacies and annuities. His executors having obtained an Indian probate, paid the debts and bequests, and converted the principal part of the estate into money, which they sent to their bankers in England, and invested it in the funds in their own names. Proceedings in equity were afterwards commenced against them in England to determine the claims of the residuary legatees, all the testator's children having died. The stock was transferred into the name of the accountant-general of the court of chancery, and the court made a decree ascertaining the shares of the several claimants:—Held, that legacy duty was not payable on the legacies, annuities or shares of residue bequeathed.

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named *Ann Nesbitt Anderson*: that there was another girl(*a*) in India born at *Coolabah* on the

To those children, or the survivors of them and their heirs, he left the whole of his property in equal divisions, subject to such regulations and legacies as he should thereafter mention; and it was his wish that his brother, Lieutenant *Patrick Anderson*, of the 19th regiment of Light Dragoons, should come to *Bombay* as one of his executors, and take the children then in *India* to *England* with him; and as that duty might put him to some expense and inconvenience, the said testator thereby bequeathed to him 500*l.* sterling as some kind of recompence, besides the amount of his passage home, which his the testator's executors were directed to pay; and all the expenses which might be incurred in *India* on account of those children, fitting them out for their voyage, the price of their passage home, and other incidental charges which were thought necessary to their comfort and safety, were to be charged to his, the testator's, estate; and the said testator thereby gave certain annuities to different persons in *England* and in *India*. To provide for those legacies and the education of the children his executors were thereby directed to place the whole of the estate securely at interest, either on landed property or in some public funds, (those of the India Company, perhaps, as safe as any,) but he left the choice entirely to his executors, in whose regard to the interest of the children he had implicit confidence; and yearly, after the regular payment of the legacies and the expenses of the children, any remaining balance was to be added to the principal for the benefit of the whole. As the annuitants died, the principal producing such annuity was to revert to the common stock for the benefit of the whole, as the whole of the estate was to be equally divided amongst the before-mentioned four children,

(*a*) Viz. *Caroline Erskine Anderson*, afterwards wife of *T. F. Middleton*.

viz. *John Anderson*, junior, *Jane Jarvis Anderson*, *Ann Nesbitt Anderson*, and *Caroline Erskine Anderson*, or the survivor of them, a regular division must be made of the estate when each came of age or was married, and the share of such person was not to be considered any longer as belonging to the public stock, but to the particular person so coming of age, if a boy, subject, however, to the controul of his the testator's executors, their heirs and assigns, for nine years more when he would have arrived at years of discretion, if ever. When the girls, or any of them, became of age or got married, he thereby directed that their shares might be so settled on themselves during their lives, and on their children in equal proportions after their death, that it would not be in the power of the husband, if so inclined, to injure either his wife or children. And the said testator's executors were supplicated to take every possible precaution against so distressing an event. Should it be the will of Almighty God to take one or more of those children to himself, the share or shares of such children dying without issue were to be equally divided amongst the survivors; but in case of issue those children were to inherit the share of their parent amongst them equally; and in case of their dying without issue it was to return for the benefit of the survivor of those four children or their families. Upon the reversion of any sums to the public stock, the issue of a deceased child was to have the share that its parent would have had if living; but again, if such issue died without issue, the whole of its original and after shares reverted to the common stock. And he thereby constituted, nominated, and appointed his brothers, *Alexander Anderson* and *Patrick Anderson*, Brevet Lieutenant Colonel *Lachlan Macquarie*, of the 36th regiment of foot, and *Charles Forbes*, of *Bombay*, Esq. (now Sir *Charles Forbes*, Bart.) executors of his said will.

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The said testator afterwards made and signed a certain codicil or testamentary paper, dated the 4th of *July* 1804, and addressed the same in a letter to the said *Patrick Anderson*, and which was, amongst other things, to the purport or effect following; that is to say, "If I should be so unfortunate as to meet with any accident to prevent my getting to *Bombay* soon, you must endeavour to get leave and go home in charge of these infants, place them at school, and be in some degree their father." And further, in the same testamentary paper or letter he writes, "After fitting out my children for the voyage and paying for your and their passage, the whole of my property in *Bombay* I would have lodged in the Company's funds, and the expenses of the children's education, together with such other legacies as I have mentioned in my will to be defrayed out of the interest of this money, and any surplus which may remain after defraying their expenses is annually to be added to the principal until the children are of age." And further, in the same testamentary paper or letter he writes, "I have half a lack of rupees, more or less, with Messrs. *Harrington*, *Burnaby*, and *Harrington*, at *Madras*, which, as they have lowered the rate of interest, I have directed to be remitted to Messrs. *Cotterill*, *Trail*, *Palmer* & Co. of *Calcutta*. This sum, if possible, I wish to allow to accumulate for eight or eleven years, when it will enable me, if alive, to keep a carriage for my daughters, and if I die it will make their portions so much the better. If I get safe to *Bombay* I expect that you will exert yourself to get leave and come and stay with me until I go to *Europe*, or as long as you can."

The said testator afterwards made and signed another codicil or testamentary paper as a letter addressed to the said *Patrick Anderson*, containing, among other things, as follows:—"After fitting out the children

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for the voyage, paying your own and their passage to *England*, and procuring bills for their expenses for the two first years, besides paying the sums I have already mentioned and those to be mentioned hereafter, be pleased to lodge the whole of my property at *Bombay*, when an opportunity occurs, in the Company's next good loan."

The said testator afterwards made and signed another codicil or testamentary paper, dated on board the *Candidate*, off *Kedgere*, the 21st *July* 1804, and addressed the same as a letter to the said *Patrick Anderson*, containing, among other things, as follows:—" I wish you to go home with the children, as you can endeavour to get on in the army at the same time. General *Lake* will hardly refuse you leave when you tell him that the father of these children served his Majesty 30 years, and that they are deprived of the protection and instruction of a mother, depending solely on your and their relations at home."

The said testator added the following statement to such last-mentioned letter or testamentary paper, and signed the same; that is to say, " Messrs. *Forbes* & Co. of *Bombay*, receive the interest half-yearly of the three notes into which the opposite of 32,000 rupees was divided or opposed to the name of each child, at 9 per cent. per annum, until they can place it to more or equal advantage in the funds of the Honourable East India Company. I wish these sums to continue accumulating until each progressively shall amount to 8000*l.* sterling, the expenses of maintaining and educating these children in the mean time to be defrayed by me, or at my expense. The reason why I have made this separate provision for these three children is, that they may be independent of me in case I should be blockhead enough to marry at my time of life, and perhaps have more children; but in the event of my death

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without an increase of family, my will, which is in the possession of the mother of the infants named on the opposite page, will show the manner in which whatever property I may die possessed of is to be distributed, including the opposite rupees 32,000, with its interest. I have paid for a cornetcy for *C. Anderson*, junior, in his Majesty's 19th regiment of Light Dragoons, on the 29th of *September* 1802. Of course, in case of my death, an equal amount of my property, with its interest from that day, will be credited to each of the girls, and the remainder then equally divided amongst the four children, or the survivors of them, agreeably to the tenor of my will. *C. Anderson.*

Camp, near *Tunkerra*, in *Guzerat*, the 30th *November* 1803."

"1803, *January* 1st. Lodged in the Treasury at *Bombay* of the East India Company 32,000 rupees, as a loan at 8 per cent., the interest payable at *Bombay* half-yearly, for the sole use and benefit of the undermentioned children, and in the proportion set down opposite to their names:—

| | |
|---|---|
| *Jane Jarvis Anderson* . . . . . | 13,600 |
| *Ann Nesbitt Anderson* . . . . . | 10,205 |
| *Caroline Erskine Anderson* . . . . | 8,115 |
| Bombay rupees . . | 32,000 |

Ditto, ditto, lodged in ditto 5000 rupees at the same rate, and payable in the same manner, for the support of the mother of those children; when she dies the principal will revert to me or my heirs, &c. . . . . 5,000."

The said testator departed this life on or about the 28th day of *July* 1804, at sea, while on a voyage from *Calcutta* to *Bombay*, without having revoked or altered his said will and codicils.

The said testator left the four children before referred to, who were all illegitimate; that is to say, *Colin Anderson*, *J. J. Anderson*, *A. N. Anderson*, and *C. E. Anderson*.

All the testator's children, except the eldest, were at the time of his death resident at *Bombay*.

By letters-patent under the great seal of *Great Britain*, bearing date at *Westminster* the 28th of *February*, in the 38th year of the reign of his late Majesty King *George* the Third, being the charter for establishing the courts of Recorder of *Madras* and *Bombay*, in the *East Indies*, his Majesty was pleased to grant, order, establish and appoint, that the court of the recorder of *Bombay* should be a court of ecclesiastical jurisdiction within *Bombay* and the limits thereof, and upon *British* subjects there residing, with the same powers, authorities and privileges, and subject to the same restrictions as are thereinbefore given, granted or mentioned unto, or as to the court of recorder of *Madras*.

By the said charter it was, amongst other things, granted, ordained, established and appointed, that the court of the recorder of *Madras* should be a court of ecclesiastical jurisdiction, and should have full power and authority to administer and execute within *Madras* and the limits thereof, and towards and upon *British* subjects there residing, the ecclesiastical law as the same was then used and exercised in the diocese of *London*, so far as the circumstances and occasions of *Madras* and the people would admit or require, and for that purpose was given to the said court full power and authority to grant probates, under the seal of the said court of the said recorder of *Madras*, of the last will and testament of all or any of the said *British* subjects dying and leaving personal effects within the

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said territories or districts respectively, and to demand, require, take, hear, examine and allow, and, if occasion require, to disallow and reject the account of them in such manner and form as was then used and might be used in the said diocese of *London*, and to do all things needful and necessary in that behalf.

In conformity with the provisions of the said charter and orders and regulations of the said court of the Recorder of *Bombay*, the defendant Sir *C. Forbes*, the said *P. Anderson*, and the said *L. Macquarie*, obtained probate of the said will and codicils from the court of the Recorder of *Bombay*.

Under the directions and authority of the said will and codicils the said Sir *C. Forbes* and his co-executors (who have both since departed this life) possessed the testator's house and land, and sold the same, and collected and got in all the testator's goods, chattels, and effects, and converted the principal part thereof into money; and they paid all his debts and legacies, and paid the annuities given by the said will as they became due, and the residue of the said testator's estate which they so converted into money was invested by them in the public funds in the manner hereinafter mentioned.

In the year 1805 *P. Anderson* proceeded to *England* with the three youngest children of the said testator, and he took with him part of the testator's assets; and on the 12th of *November* 1811, Sir *C. Forbes*, on behalf of himself and the said *P. Anderson*, (the said *L. Macquarie* being absent and never having intermeddled with the said testator's estate and effects, and pursuant to the rules and regulations of the recorder's court of *Bombay*,) rendered unto the recorder of the said court an account of the administration of the said testator's estate and effects by the executors, and the

same accounts were examined and passed as approved of by the said court.

Previous to Sir *C. Forbes'* departure from *Bombay* for *England*, which was in the month of *November* 1811, the balance appearing by the said account to be due to the said testator's estate was remitted by him to Messrs. *Porcher* and Co. in *London*, as the agents and bankers of the said executors, and they afterwards accounted for the same to the said Sir *C. Forbes*.

Sir *Charles Forbes*, and his co-executor, *Patrick Anderson*, collected, got in and administered the said testator's goods, chattels, and effects as aforesaid, and invested the residue or a principal part of such residue in Bank 3 per cent. annuities, in the joint names of the said *Patrick Anderson*, *L. Macquarie*, and Sir *C. Forbes*.

*Colin Anderson*, the son, attained his age of 21 years in the year 1809, and a separate account was kept with him of sums paid and expended on his account, but no distribution of the testator's residuary estate was made in the lifetime of the said son. And the said Sir *C. Forbes* continued to make payments on his account, and to maintain the other three children out of the interest or dividends arising from the testator's estate.

In the month of *March* 1819, the testator's eldest daughter, *Ann Nesbitt Anderson*, (she being then an infant,) intermarried with the plaintiff, *George Jackson*.

The said executors never applied for or obtained probate to be granted of the said testator's will by the prerogative court of *Canterbury*.

On 20 *May* 1819, *George Jackson* the above named plaintiff, and *A. N.*, his wife, (and which said *A. N. Jackson* was one of the said children of the said testator, and is since deceased,) filed their original bill of complaint in the High Court of Chancery in *Eng-*

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*land* against the said *C. Forbes* (now Sir *Charles Forbes*, Bart.) *Colin Anderson* (since deceased,) and *Caroline Erskine Anderson*, afterwards the wife of the said *T. F. Middleton*, but since deceased, also against *L. Macquarie* (who was then out of the jurisdiction of the court and since deceased,) thereby stating the said will and codicils, partly to the effect hereinbefore stated. And further stating the death of *C. Anderson*, the testator, leaving *C. Anderson*, *A. N. Anderson*, *J. J. Anderson*, and *C. E. Anderson*, the residuary legatees named in the will and codicils, him surviving. It then stated the proof of the will and codicils by all the executors in *India*, and erroneously stated that Sir *C. Forbes* had proved the same in the prerogative court of *Canterbury* in *England*. It stated the death of *J. J. Anderson*, an infant, and unmarried; the payment by the executors of the maintenance and education of the plaintiffs *A. N.* and the defendant *C. E. Anderson*, and the purchase of a commission by them for *C. Anderson*; that the residuary estate had been laid out in stock; that 49,900*l.* bank 3 per cent. annuities so purchased stood in the bank books in the executors' names; that *P. Anderson* was dead; that *C. Anderson* had attained 21; that *C. E. Anderson* and *A. N. Jackson* were infants, the latter married in *March* last to plaintiff *Jackson;* that marriage articles had been made before the marriage for settling the uncertain interest of *A. N. Anderson*, under the will and codicils to the effect therein stated.

The bill then prayed that the rights and interest of the said plaintiff *George Jackson*, and the said *A. N. Jackson*, in right of the said *A. N. Jackson*, and of all parties to and in the residuary estate and effects of the said testator, might be ascertained and declared by the court, and that the share and interest

of the said *A. N. Jackson* might be transferred into the names of the trustees of the said marriage articles, upon the trusts of the said marriage articles, and, if necessary, that accounts might be taken of the estate and effects of the said testator and of his debts, and the legacies and annuities given by his will, and that such residue and the share of the said *A. N. Jackson* thereof might be ascertained, and an account taken of the interest and dividends of the said *A. N. Jackson* therein, which had accrued due, and that the same might be paid to the said plaintiff, *George Jackson*, and that all proper accounts might be taken and directions given for effecting the purposes aforesaid.

The defendants, except *L. Macquarie*, who was out of the jurisdiction of the court, appeared and put in their answers thereto, and the said Sir *C. Forbes* by his said answer admitted only *that the said will and codicils were proved in the recorder's court of Bombay; and that he and his co-executor, Patrick Anderson, had got in and received the personal estate and effects of the said testator, and had remitted the same, together with the proceeds of his house and lands at Coolabah, which they had sold, to England, and that they had paid and discharged the testamentary expenses of the testator, and his debts and legacies given by his will, and had kept down the annuities bequeathed thereby, and they admitted that the residuary estate of the said testator had been laid out in the purchase of stock in the public funds, and that there was then standing in the names of the said P. Anderson* (then deceased), *L. Macquarie and Sir C. Forbes, in the books of the Governor and Company of the Bank of England, 49,900l. bank 3 per cent. annuities, which had been purchased with such resi-*

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*dwary estate.* And that there was in the hands of the said Sir *C. Forbes* a balance of cash. And he said he was unable to determine the rights and interests of the plaintiff, *A. N. Jackson*, and the other persons interested under the will and codicil of the said testator, and he therefore claimed the directions of the court in that respect. And he submitted to act as the court should direct.

The said cause came on to be heard before the Master of the Rolls on 25 *April* 1820, when it was referred to the master to take an account of the personal estate of the said testator not specifically bequeathed, come to the hands of the said Sir *C. Forbes*, or of any person or persons by his order, or for his use, and also an account of the said testator's debts, funeral expenses, legacies and annuities, and that the said testator's personal estate not specifically bequeathed, should be applied in payment of his debts and funeral expenses in a due course of administration, and then in payment of his legacies and annuities, and that the master should ascertain the clear residue of the said testator's personal estate; and the usual directions were given for taking the said accounts, and the consideration of all further directions and of the costs of the suit was reserved until after the master should have made his report.

The executors made various payments out of the said testator's estate to *Colin Anderson*, the son, and towards the support and education of the said testator's daughters, by which means the said bank annuities became eventually reduced to the 36,000*l.* bank 3 per cent. annuities hereinafter mentioned.

After the decree *of 25th April* 1820, *L. Macquarie* was brought before the court as a defendant by supplemental bill, and *Caroline Erskine Anderson*, with

the approbation of the court, intermarried with the defendant, *T. F. Middleton*, and articles for a settlement were thereupon entered into with the approbation of one of the masters of the Court of Chancery. The plaintiff, *George Jackson*, and his said wife having had two children, namely, *George Jackson Jackson*, and *John Anderson Jackson*, they, the said *George Jackson* and *A. N.* his wife, in or as of *Hilary* term 1823, filed their supplemental bill against the said *T. F. Middleton* and *C. E.* his wife, and the trustees of the said marriage articles, and also against the said *G. J. Jackson* and *J. A. Jackson*, for the purpose of bringing the said several parties before the court; which supplemental cause having come on to be heard, the usual decree was made therein.

On 25 *October* 1824, the master to whom the original and supplemental causes stood transferred, made his general report therein of that date, whereby he *found* that *no creditor had come in to prove any debt in pursuance of advertisements* in the London Gazette and other public papers for that purpose, and *that the legacies of the said testator were all paid, and were included in the schedules to his report, and also* certain annuities, all of which had lapsed by the death of the annuitants, except an annuity of 720 rupees, payable monthly to Mrs. *Mary Burchall* the mother of the testator's children, and who was resident at *Bombay*, for the term of her life, and an annuity of 50*l.* to *Mary Thompson*, a niece of the testator, resident in the *county of Dublin*, determinable on her death or marriage. And he found *that the defendant, Sir C. Forbes and the said Patrick Anderson, by virtue of the said probate granted in India, collected, and got in the testator's effects in India, and administered the same in India jointly until the* 14*th of*

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*February* 1805, when the said *Patrick Anderson*, pursuant to the directions contained in the said will and testamentary papers of the said testator, proceeded with the said three female children of the said testator to *England*, and that the said Sir *C. Forbes* continued in *India* after the said *Patrick Anderson* left *India for England as aforesaid and administered the estate and effects of the testator in India, and collected and got in such parts thereof as were not taken by the said Patrick Anderson* with him to *England*, and that on or about the 12*th* of *November* 1811, the said Sir *C. Forbes*, on behalf of himself and the said *Patrick Anderson, pursuant to the rules and regulations of the recorder's court at Bombay, rendered an account of the administration of the testator's estate and effects in India* by him and the said Sir *C. Forbes* jointly and separately, and which account *commenced on the* 1*st of August* 1804, *and ended on the* 31*st of August* 1811, and the master adopted and allowed an official or notarial copy *thereof as an account of the administration of the testator's estate in India, and the balance of which*, amounting to the sum of 2407*l.* 12*s.* 7*d.* is accounted for as a receipt in *England* on 23 *January* 1813, and as such, is included in the first schedule to the said report under that date. And the master thereby further found, that the said Sir *C. Forbes*, jointly with the said *P. Anderson*, by themselves and their agents, between 18 *December* 1809, and 31 *December* 1818, received of the personal estate of the testator, several sums of money amounting together to the sum of 41,074*l.* 13*s.* 10*d.* as appearing by the first schedule to his report, and against which he also found that they had made certain payments and disbursements as appearing by the second schedule to his report. And the said master further found that the said defendant, Sir *C. Forbes*,

had since the death of his said co-executor, *Patrick Anderson*, by himself and his agents received of the testator's personal estate several sums, appearing by the said first schedule to amount to the sum of 25,216*l.* 7*s.* 7*d.*, and had also paid and disbursed various sums as by the said second schedule also appeared. And the said master further found that the said Sir *C. Forbes* was allowed in the said second schedule a sum of 4000*l.* set apart as a capital sum bearing compound interest in the hands of the said Sir *C. Forbes* and his agents for the purposes of securing the annuity to the said *M. Thompson* and the said annuity to the said *M. Burchall*; and that the same, subject to such annuities, was subject to the general trusts of the testator's will; and that with the said compound interest received, the same then amounted to the sum of 5018*l.* 12*s.* 10*d.*, as appeared by the third schedule to the said report; and after referring to payments made in respect of the said annuities as appearing by the fourth schedule to the report, and stating that the said Sir *C. Forbes* had claimed to be allowed several sums paid for maintenance, education, and advancement of the testator's children, but which the master had not thought fit to allow, as not falling within the scope of the inquiries directed by the decree, the said master certified, that the clear residue of the said testator's personal estate then consisted of the sum of 36,000*l.* 3 per cent consols, standing in the names of the said *P. Anderson*, deceased, *L. Macquarie*, deceased, and the said defendant, Sir *C. Forbes*, and of the sum of 30,683*l.* 0*s.* 5*d.* then due from the said Sir *C. Forbes*, subject nevertheless to the said two annuities.

The legacy of 50*l.* to the said *Patrick Anderson*, and the legacy of 50*l.* to the said Sir *C. Forbes*, and the said legacy of 50*l.* to the said General *Macquarie*, and the

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legacy of 50*l.* to the said *Alexander Anderson*, and the value of a lieutenancy to *Colin Anderson*, viz. 564*l.* 2*s.* are allowed as disbursements to the said Sir *C. Forbes*, *and the legacy duties on such legacies*, and also on the value of the annuities to the said *M. Thompson*, *A. Anderson*, *I. Thompson*, and *I. M'Dougal*, are also allowed as payments by the said master in the second schedule to his said report, *but nothing in respect of probate duty, and no other payments in respect of the legacy duty are claimed or allowed.*

The said *Colin Anderson* having died intestate and illegitimate on 22 *June* 1822, the attorney general was brought before the court by supplemental bill in respect of the interest of the said *C. Anderson* in the said trust funds.

The said *Jane J. Anderson* having also died intestate and without issue on 19 *April* 1812, letters of administration to the said *C. Anderson* and *J. J. Anderson*, limited to the purposes of the suit, were granted to *J. H. Forbes*.

The said *A. N. Anderson*, another of the said children, who had intermarried with the plaintiff, *G. Jackson*, afterwards died leaving several children, and having made a will, and a bill of revivor and supplemental was filed to revive the suit and to make her children defendants.

On 7 *July* 1829, the plaintiff and the defendants, *T. F. Middleton* and *C. E.* his wife, and the said infants, *G. J. Jackson*, *J. A. Jackson*, *A. Jackson*, and *J. Jackson*, presented their petition to the Master of the Rolls in all the said causes, stating as thereby appears, and praying payment of certain advances for maintenance of the said *A. N. Jackson* and *C. E. Middleton* out of their shares of the said trust funds, and for enquiries as to their subsequent maintenance, and also

the maintenance of the children of the said *A. N. Jackson*.

On 17 *July* 1829 the three first mentioned causes came on to be heard before the Master of the Rolls for further directions, and as to the matter of costs reserved by the said decree, and the said petition and the said supplemental suit coming on to be heard at the same time, his Honor did order that it should be referred to the master to whom these causes stood referred, to enquire and state to the court what sum ought to be set apart to answer the two several annuities of 15*l.* and 750 rupees in his said report mentioned; and his Honor did declare, that according to the true construction of the testator's will, the said *J. J. Anderson*, *A. N. Anderson*, and *C. E. Anderson*, the three residuary legatees, who were girls, were in no event to take more than an interest for their respective lives, but that *C. Anderson*, one of the residuary legatees, being a boy, was to take an absolute vested interest on attaining his age of 21 years; and his Honor declared, that while all the residuary legatees continued under age and unmarried, the residue of the testator's estate formed an aggregate fund, out of the interest whereof they were to be maintained and educated; and that the surplus interest, after paying the expenses of their maintenance and education, was to be invested and added to the principal, for the benefit of the persons who should be eventually entitled thereto.

(The decree then proceeded (*a*) at great length to declare the rights of the four deceased legatees,

(*a*) During the argument Lord Lyndhurst expressed his opinion that the effect of the decree and proceedings in Chancery might have been more briefly stated than had been done in the case. The rest of the decree, orders, &c. of the Master of the Rolls, and of the reports of the Master in Chancery, have been therefore omitted.

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and of their issue, &c. among the residuary legatees to the residue of the estate, directing reference to the master to take an account thereof against the executors. It appeared by a clause of the decree that that share of the testator's residue which had been invested in 3 per cent. consols in the names of the executors, *viz.* 36,000*l.* had been increased to 47,704*l.* 3*s.* 3*d.* consols, and stood in the name of the accountant general of the court of Chancery, in trust, in the cause of *Jackson* v. *Forbes*.)

Since the said decree, the said defendant *C. E. Middleton* hath died, having had two children, both of whom died in her lifetime, but administration to them hath been taken by their father, the defendant *T. F. Middleton*, and he hath filed a bill claiming to be entitled to the share of his said wife of the said testator's residuary estate.

The Attorney General, in *October* 1830, presented a petition in these causes praying that it might be declared that his Majesty is entitled to be paid the amount of the probate duty and of the legacy duty upon the whole of the testator's estate and effects which were brought or remitted to *England*, or administered or remaining to be administered in *England*, and that probate of the will and codicils of the testator ought to have been taken out from the prerogative court of the archbishop of *Canterbury* upon the same estate and effects, and that directions might be given for obtaining and taking out such probate, and praying the necessary directions for the raising and paying the amount due to his Majesty in respect of the said probate duty and legacy duty.(*a*)

The said Sir *C. Forbes* and other parties in this cause, at or about the same time, presented a cross

(*a*) See 36 Geo. III. c. 52. s. 25.

petition in the said cause, praying that the Attorney General's petition might be dismissed, and that it might be declared that the said executors were not required by law to have obtained probate in this country, and that the testator's estate was not liable to probate duty, and that the residuary estate of the testator collected and alleged to have been appropriated in the *East Indies*, was not liable to duty chargeable upon legacies, annuities and shares of residue, under the acts of parliament now in force touching testator's estates got in and distributed under probates of wills granted by the ecclesiastical courts of this country.

The two petitions came on together to be heard before the Lord Chancellor on or about the 16th *of February*, 1831, who ordered that a case should be made for the opinion of the court of Exchequer as to the questions raised.

Either party to be at liberty to refer in the argument to the testator's will and codicils, or the probate thereof, or any other document or proceeding in the said causes mentioned in the case.

The questions for the opinion of the court are,

1st. Whether the said *Sir C. Forbes* and his co-executors were not bound to have taken out probate from the prerogative court of the archbishop of *Canterbury* to the testator's will and codicils, before they could legally do all or any and which of the acts hereinbefore stated.

2d. Whether the said Sir *C. Forbes* and his co-executors were not, and whether the said Sir *C. Forbes*, as the survivor, is not bound to take out probate from the prerogative court of *Canterbury*, and to pay a probate duty upon the whole or any and what part of the testator's property collected in *India*, and brought or transmitted to *England* as aforesaid.

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3d. Whether the duties chargeable upon legacies, annuities, and shares of residue under the acts of parliament in force touching such duties upon testator's estates administered in *England*, were and are chargeable in respect of all or any and which of the legacies, annuities, and shares of the residue respectively bequeathed by the testator's will and codicils.

The *Solicitor General*, (Sir *W. Horne*,) for the crown (*a*). The crown claims legacy duty on the fund in chancery, as the produce of property, which, though locally situate in *India*, and belonging to a testator who died there, was remitted by the executors to their agents in this country, to hold for and pay to the executors. The executors received payment accordingly, and dealt with it here in their representative character, by investing it in stock in their own names. Then this was a mere remittance of general residue unadministered, nor was it specifically appropriated in *India* by being sent in the proportions to which the legatees were entitled, or to a third person in trust for them. The investment in stock cannot be considered a "payment" to the legatees by the executor within 36 G. 3. c. 52. s. 6., and the residuary legatees were in no different situation from them, in respect of the remedy of either against the assets undisposed of, which could only be had by suing the executors. [Lord *Lyndhurst* C. B. If the funds had ever been in the hands of trustees in a gross sum without directions for subdivision among the parties entitled, could the crown have claimed legacy duty?] The agents here were mere consignees, and the execu-

(*a*) *Wray* and *Amos* with him. The first and second questions relating to probate duty having been abandoned by the crown, were struck out of the case by Lord *Lyndhurst's* direction.

tors invested the funds in their own names (*a*) as executors of the will. The equity suit commenced in 1819 was the ordinary suit, calling on the executor to administer all the assets of the testator. It was necessary for impounding and securing them, and also for obtaining the judgment of the court on the uncertain rights of the residuary legatees, who represented natural children. At that period nearly a moiety of the assets was cash in the hands of the executor, Sir *C. Forbes*, and could not be said to be appropriated; the legacies were not appropriated, but were treated as part of the mass of the personal estate. The answer of Sir *C. Forbes* shows that no payment or appropriation had taken place. [Lord *Lyndhurst* C. B. He says the fund does belong to the legatees, including of course the residuary legatees, but in what proportions he cannot say. Were all the debts paid in *India* (*b*)? *Bayley* B. Suppose the testator had lived and died in *Ireland*, having only Irish property and Irish debts, and that this executor had taken out a *Dublin* administration; if he afterwards vested the assets in the English funds, on trusts for the testator's children, and came over here to do so, could the English legacy duty be claimed? Lord *Lyndhurst* C. B. Is this not an appropriation of the sums to the legatees subject to outstanding claims, for example, debts?] No, for the character of executors remained *quoad* the fund, which remained assets for payment of debts &c., and was wholly unadministered. [Lord *Lyndhurst* C. B. Had Sir *C. Forbes* been here, the securities in *India*, and

(*a*) See Lord *Eldon's* observations on a similar fact in *Attorney-General* v. *Manners*, 1 Pri. 411 and 424; and see *Hill* v. *Atkinson*, 1 Pri. 404—407.

(*b*) See p. 362. No claim of debts was made in consequence of advertisements in the Gazette, between the reference to the Master of 25 *April* 1820, and the report of 25 *October* 1824; see p. 367.

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these legatees had filed a bill here, the money would be paid here. Would legacy duty be payable?] The answer does not say the executor ever attempted to appropriate the legacies, and the decree ascertains that they were not appropriated; for if the whole did not remain a general unappropriated personal estate of testator, liable to his debts and legacies, the court must have been in error in making the common decree, and would have said this is a trust fund appropriated to the benefit of particular legatees as *cestui que* trusts (*a*). Now has there been in fact any act of appropriation since 1829, when the decree of the court declared the rights of the parties? (*b*). [Lord *Lyndhurst* C. B. The ordinary course of a court of equity on referring an account to be taken against executors was here followed.] *Logan* v. *Fairlie* (*c*) turned entirely on the want of appropriation in *India* of the legacy to the specific use of the legatee in *England*, and applies in this case; for there the legacy duty was held payable, though the acts of appropriation by the executor in *India* were much stronger than in the present, he having, as far as he could, separated the sum remitted to *England* from the testator's assets, and appropriated it to the legatees by directing his English agent to pay one moiety of it to one legatee and the other to the other, or her children. [Lord *Lyndhurst* C. B. I do not see how the instituting a suit in chancery makes any difference. Suppose this fund after payment of all debts in the *East Indies* had been sent by the

(*a*) Legacy duty had been allowed by the master in chancery on the smaller legacies to the executors &c., forming part of the English account; see *ante*, 370 & 373, n. *a*.

(*b*) See *Hill* v. *Atkinson*, *cor*. Lord *Eldon*, 3 Pri. 399. 404. 407.

(*c*) 2 Sim. & Stu. 284.

executors in *India* to their bankers here, to be paid to the different parties entitled to shares according to their rights, and that no doubt had existed as to their rights, would the payment by the bankers in equal divisions to ascertained legatees here have made it liable? Would the executors' order to their bankers to apportion the fund to the four legatees, and their payment to them in consequence, have made it a payment liable to legacy duty? The sum bequeathed would in both cases be equally liable to pay the testator's debts. If the fund is found in this country undivided, you say that by the division here it becomes liable to legacy duty, but the court of chancery is the mere medium of ascertaining the shares. The property is as much administered by the executors without as with that court. (*a*)] In this case the fact of a probate taken out in *England* is wanting, but in *Logan* v. *Fairlie*, as in this case, it is all along supposed as true, that the executors had taken out administration in *England* so as to give the court of chancery power over the personal representative, and it is also necessary in this case. *Attorney-General* v. *Cockerell* (*b*), and *Attorney-General* v. *Beatson* (*c*). [*Vaughan* B. If probate is necessary here, why should not probate duty be payable? But the claim to that is not insisted on.] There is here no dispute about an *Indian* domicile or an *English* domicile acquired by a residence in *India*. [Lord *Lyndhurst* C. B. Where is it laid down that there can be no *Indian* domicile? Chief Baron *Thompson* expresses himself cautiously on that subject in the *Attorney-General* v. *Cockerell* (*d*).] *Monro* v. *Douglas* (*e*) shows that a

(*a*) The Chief Baron was here understood to allude to the judgment of *Thomson*, L. C. B. in *Attorney-General* v. *Manners*, 1 Pri. 424.

(*b*) 1 Pri. 165. (*c*) 7 Pri. 360. (*d*) 1 Pri. 177.

(*e*) 5 Madd. R. 404, *Leach*, V. C. 1820. And see *Bruce* v. *Bruce*, 7 Bro. P. C. 230. Tomlin's ed. 2 B. & P. 228, S. C. n.

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*Scotsman* may acquire a domicile in *India* by local residence in the *East India* Company's service, so as to make the *English* law of distributions prevail over the *Scotch* law; but that is, because *India* is subject to *English* law. In this case there can be no *Indian* domicile (*a*), but the *domicilium originis* only. There is no exception in stat. 36 G. 3. c. 52. which can detract from the force of its general words.

Sir *Charles Wetherell* for the defendants (*b*). The dictum of the present Master of the Rolls in *Logan* v. *Fairlie* is relied on, "That if a part of a testator's assets is found in *England* in the hands of the agent of the executor, without any specific appropriation, and a legatee in *England* institutes a suit here for the payment of his legacy out of such unappropriated assets, then such assets are to be considered as administered in *England*, and the legacy duty is payable in respect of them." But the smallness of the duty there claimable, 14*l*., might have induced that legatee to waive this question and pay the amount.

But if the present argument for the crown is to prevail, property in every foreign colony may be made liable to legacy duty, if the legatee or executor either came to *England* or shifted it hither. [Lord *Lyndhurst* C. B. Suppose a *French* or *German* testator to leave an executor who came to *England*, or invested the property here, would it be liable?] According to the argument on the other side, the result *quoad* legacy duty would be the same as if the property had been originally situated within the province of *Canterbury*, and the testator had lived and died in *England*. But the old rule must prevail, that an act of parliament

(*a*) Testator was in the king's service. See *per* Lord *Thurlow*, in *Bruce* v. *Bruce*, *Dom. Proc.* 2 B. & P. 230.

(*b*) With him *Barber*, *Garrett* and *Lewis*.

cannot bind the colonies without express words (*a*). Stat. 36 G. 3. c. 52., construed according to its general wording, would include the property of an *English* subject living abroad; but every enactment in it implies that the property contemplated shall be situate, and its owner resident, in *Great Britain*, and that his assets must be distributed under authority granted by a British court. Again, the control exercised over the executor under sec. 6 of the act implies that he is under British jurisdiction. Section 2 applies to wills, the probate of which belongs to the ecclesiastical courts in *England* or *Scotland*, and not to the like jurisdictions in *India*. [*Bayley* B. It is only contended for the crown that legacy duty is payable on property brought here from the colonies, and paid here.] The question is, whether this act has force over all property in the king's foreign dominions? And the answer must depend not on the accidental circumstance of the money being paid here, or the caprice of a foreign executor, who may or may not come here, but on the territorial limits within which this act is to operate. By sec. 6 the executor is the party made liable to the crown for the duty; but if the executors had never come within the jurisdiction of the *English* courts, or, having collected the assets in *India* under the *Indian* administration, had sent over the legacies to the legatees here, how could they be made amenable? For the remedy is only personal against them when here.

The argument for the crown amounts to this, that if the testator uses an expression so doubtful that it is necessary to apply to an *English* court to interpret it, this fiscal enactment applies; whereas, if the will be clear, so as to be at once acted on, it would not.

[Lord *Lyndhurst* C. B. They do not contend that duty would be payable if a specific appropriation took

(*a*) 1 Bla. Com. 107, &c.

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place abroad; that is, if 1000*l.* was sent over to be divided between two legatees, they admit no duty would be payable, but contend, that if it were sent over to a banker, and an order should be afterwards given to that banker to pay it over to legatees, it would then be liable. It is very difficult to draw the requisite line. *Bayley* B. In the case put of appropriation abroad, the payment of duty would depend not on the person to whom the legacy is to be paid, but on the executor's coming within the jurisdiction, or the reverse.]

It is said, that if the executor chuses to pay through a banker here, it is no appropriation, while if he comes hither and pays in person it is. Suppose a *British* subject makes a will in *Paris* bequeathing stock in *French* funds to two legatees in moieties, and makes an *English* executor, who takes out the *French* administration and goes to *England;* the legatees follow, and compel him, in an *English* court, to transfer the *French* funds to them; it would follow that by the accidental presence of the executor here the legacy duty would be payable by the objects of the testator's bounty, and that the property is to be considered as property in *England* within sec. 6 of the legacy duty act. But as a foreign executor might never come here, it necessarily follows that the payment of legacy duty must in such cases depend on the caprice of the personal representative.

In the *Attorney-General* v. *Cockerell* there was an *English* probate; nor can the case be taken as a general proposition, even if all the circumstances are accurately stated. [Lord *Lyndhurst* C. B. In that case an *English* probate became absolutely necessary to Sir *C. Cockerell*, not at the death of the testator, but only in consequence of the death of his acting executor, Gen. *Duff*, to enable Sir *C. C.* to get the testator's assets from the executors of General *D.*] It is possible a

case may be put where *English* probate may be necessary, and yet legacy duty may not be payable; but the single circumstance of *English* probate being necessary does not affect this question.

In the *Attorney-General* v. *Beatson* it was also necessary to have *English* administration with the will annexed; but no such necessity exists here.

The cases of *In re Ewing* (*a*) and *Attorney-General* v. *Dimond* (*b*) support this view of the case. In the latter a distinction was taken between the probate and legacy duty, for legacy duty had been paid, and probate duty was held not payable. [*Bayley* B. If a testator, dying in *England*, leaves a legacy to a *Frenchman*, the executor cannot pay it without deducting legacy duty.] In that case *English* probate might be compelled, and the legacy is derived not only under it but under a title entirely *English*. A trustee is entitled to ask a court of equity to ascertain if debts are payable from the estate. It is said that by so doing legacy duty accrues; but if an executor is clear that no debts exist, and no inquiry therefore takes place, no legacy duty will be payable; now that test is of too adventitious a character to rest the construction of the act on.

No question here arises whether testator died having an *English*, *Scotch*, or *Indian* domicile, or whether his property was to be administered by *English* or *Scotch* law. The question here is, whether the whole administration of property situate and collected abroad under authority dehors the control of the legacy duty act, is brought within the provisions of that act by being found in this country, when, had the executors thought fit to keep it abroad and to remain abroad themselves, it never could have been made liable? In that view the testator's dying in *India* is of importance, though if the question were one of distribution on an intestacy, *viz.*

(*a*) Vol. I. 91. (*b*) Vol. I. 254.

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whether the law of *English* or *Scotch* domicile should prevail in the disposition of his assets, his death in *Hants* or *Hindostan* might not affect the result: the court is now called on to say what would be a proper court of probate. Now that is decided by the locality of the assets, which in this case have an indefeasible *Indian* character, so that in *India* only could the title be granted by which the executor could collect them, an *English* prerogative probate being useless there.

The question whether an *English* probate, when granted, makes the property *English* or not, does not arise, for no such probate exists, or is there any necessity for it. [*Bayley* B. Suppose a testator having property in *England* and other property in *France*, 60 per cent. legacy duty being payable in both countries, could both duties be payable on the same sum, because brought from one country to the other?]

The *Solicitor-General* in reply. The words of the act are general, "every legacy," not "every *British* legacy or legacy of a *British* testator." It did not appear that any legacy at all existed, till ascertained by the original decree. It cannot be denied that this suit is respecting the assets of the testator, and that in whatever country a court is which administers unappropriated assets, the administration is of that country. [*Bayley* B. Why may not a legatee of *Indian* assets, on arriving hither after the executor, say, you have wrongfully come here with the produce of the *Indian* assets realized at *Bombay*, under letters of administration granted there, and now claim to deduct so much for legacy duty, which is said to be due by the law of *England?* Would it be an answer to say there must be an *English* administration?] It was necessary for these legatees to sue, for they could not deal with the property as a trust fund unless the executor admitted it to

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be appropriated as such. Then as a court of equity does not deal with these cases as of its original jurisdiction, but exercises power over the personal representatives of the party, administration is always taken out so as to bring them before it. [*Bayley* B. If the legatees had cited the *Indian* executors in a court here to take out *English* administration, or permit it to be granted to some one else, it would have occasioned great expense and an opening to fraudulent creditors.]

*Cur. adv. vult.*

The following certificate was afterwards sent to the Lord Chancellor:—

This case has been argued before us by counsel. We have considered it, and are of opinion that the duties, &c. were not chargeable in respect of any of the legacies, annuities, and shares of residue bequeathed by the testator's will and codicils.

LYNDHURST.
J. BAYLEY.
J. VAUGHAN.
W. BOLLAND.

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## JONES *against* PRITCHARD.

After a new trial granted, the defendant took the record down by proviso. On motion by the plaintiff an order was made by the judge at the assizes to put off the trial for the absence of a material witness, on the plaintiff's undertaking to enter the cause for trial at the next assizes: The court granted judgment as in case of a nonsuit, for not proceeding to trial at the latter assizes, though the judge's order had not been made a rule of court.

*JOHN JERVIS* moved for judgment as in case of a nonsuit, for not proceeding to trial in pursuance of a peremptory undertaking. The action was originally brought in the court of great sessions for *Anglesea*, and was tried there in 1830. The defendant had a verdict,

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but *Raine* C. J. granted a new trial. The defendant took the case down by proviso to the summer assizes 1831, when the plaintiff applied to the court to put off the trial on account of the absence of a material witness. *Bolland* B. made the order prayed, on a peremptory undertaking by plaintiff to enter the cause for trial at the *Lent* assizes of 1832; but his order was not made a rule of court, nor was the cause so entered for trial.

Lord LYNDHURST C. B.—This being a bargain between the parties, it was not necessary to make it a rule of court (*a*).

Rule granted (*b*).

(*a*) See *Hawes* v. *Johnson*, 1 Y. & J. 12; and 4 Burr. 2569.

(*b*) Absolute in first instance in Exchequer, 9 Pri. 389. So *semb.* in K. B. Sayer, 74; Barnes, 315.

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## REES *against* REES.

Execution was permitted to issue from the Exchequer on judgment signed in a Welsh court of great sessions, the costs having been taxed there, without taking out a summons before a baron to correct the suggestion, by which the proceedings were continued in Exchequer.

FINAL judgment had been signed and costs taxed in this cause in the *Carnarvonshire* great sessions, before the passing of 11 G. 4. and 1 W. 4. c. 70., and a certificate thereof having been filed by the plaintiff, as required by Reg. Gen. *Mich.* 1 W. 4. [Vol. I. 165,] the proceedings were continued by suggestion in this court, according to the same rule.

*Halcomb* moved that execution might issue out of this court without taking out a summons before a baron for correcting the suggestion, on the ground that such a summons would operate as notice to the defendant of the execution, and would therefore probably deprive the plaintiff of the benefit of his judgment.

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Lord LYNDHURST C. B.—The costs have been taxed in the Welsh court, and may have been paid there; but if an affidavit can be produced that they have not been so paid, execution may issue without notice to the defendant.

Rule granted on production of the above affidavit.

The court refused to include in the rule the costs of the application, without notice of taxation to defendant's attorney.

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## MORGAN *against* HARRIS.

Particulars of demand having been delivered to the defendant's attorney under a judge's order, another bill of particulars was afterwards annexed to the record by the plaintiff's attorney, pursuant to *Reg. Gen. Trin.* 1 W. 4. as and for a copy of the particulars of demand, but in fact containing items not stated in the particulars delivered to the defendant. The plaintiff's evidence at the trial was confined to the items exclusively set forth in the particular annexed to the record. The defendant's counsel not being prepared to prove the delivery of the particulars to the defendant's attorney under the judge's order, did not apply for a nonsuit. The court granted a new trial, without costs, but refused to enter a nonsuit.

ASSUMPSIT for work and labour and materials found. At the trial before *Bolland* B. at the *Lent* assizes for the county of *Carmarthen*, it appeared that, in pursuance of the judge's order, a bill of particulars was delivered, stating that the action was brought to recover the sum of 30*l.* due to the plaintiff on a balance of account for work and labour done by the plaintiff and his workmen for the defendant, and for materials found in and about the same, during the months of *March*, *April*, and *June* 1826, and in the month of *March* 1827. At the time the record was entered with the judge's marshal, the plaintiff's attorney, in pursuance of Reg. Gen. *Trin.* 1 W. 4. (Vol. I.

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522,) annexed to the record a paper as and for a copy of the above particulars of demand, but in fact differing from it in also claiming for work done at different times "from about *June* 1826 to *August* 1827." The plaintiff's counsel opened his case by declaring that he did not intend to proceed for work done in *March*, *April*, or *June* 1826, or in *March* 1827, *viz.* the months stated in the particular delivered, but adduced evidence of work done in *August* 1826, as to which he was able to prove a promise by the defendant in *November* to pay the amount. The defendant's counsel objected that the particular annexed to the record differed from that delivered to the defendant, and which he had come prepared to try; but not being prepared to prove by a witness the particulars so delivered, he did not apply for a nonsuit, and the plaintiff had a verdict for 20*l*.

*John Evans* had obtained a rule to set aside the verdict and to enter a nonsuit, or for a new trial, on the above facts, and on an affidavit that no such particulars were delivered to the defendant as those annexed to the record. He also moved to set aside the verdict as against evidence, and *Bolland* B. reported that he was not satisfied with the verdict.

*E. V. Williams* showed cause. The defendant sustained no injury by the variation relied on by the two bills of particulars, for though the verdict was for work not included in the first particular, the defendant was not in a condition to apply for a nonsuit, not being able to prove its delivery (*a*). Nor could he mistake the point in contest, and was in fact prepared to meet, and did meet, the evidence on which the plaintiff obtained a verdict. The defendant therefore sustained no injury, or his counsel would have interposed at the time. He then supported the verdict on the evidence.

(*a*) See *Macarthy* v. *Smith*, p. 388, n.

*John Evans* and *Whitcomb* contrà. The defendant is not to be prejudiced by the artful variation of the two bills of particulars. [Lord *Lyndhurst* C. B. The defendant is doubtless entitled to a new trial, but no leave was reserved to him to move to enter a nonsuit on any point taken at the trial.] The defendant ought not to be deprived of that advantage, because from a just confidence that the particular annexed to the record by the plaintiff's attorney would be, as it ought to be, a counterpart of that delivered to him under the judge's order, he came to trial unprepared to prove that delivery. For the very object of the new rule of all the courts, for annexing a copy of the particular of demand to the record, was to save the expense of bringing down a witness merely to produce the particular delivered to the defendant's attorney, and prove its delivery, and to take away the opportunity of a reply (*a*). The possible act of altering the items of the particulars by the plaintiff's attorney was never contemplated. The defendant's counsel, at the close of the plaintiff's evidence, was entitled to insist that no claim had been established which was included in the particular delivered to him, and to rely on the copy annexed to the record (*b*) in support of that argument. The record was in the custody of the associate previously to the trial, so that defendant had no opportunity of discovering the new insertions in the supposed copy of the particulars annexed to it. His counsel, for the first time, ascertained the variation at the close of the plaintiff's case, and the absence of the witness to prove the delivery of the original particulars prevented him from applying for a nonsuit. Had the

(*a*) See *Rymer* v. *Cook*, M. & M. Rep. 86, n. *per Bayley* J. and *Hullock* B. at *Lancaster*.

(*b*) See *Macarthy* v. *Smith*, p. 388, n.

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plaintiff's evidence been confined to the particular delivered by his attorney, he must have been nonsuited.

Lord LYNDHURST C. B.—Had the objection that the particulars delivered varied from the copy annexed to the record, been raised at the trial, it might have been reserved; but the plaintiff would have had a right to appear and to resist being nonsuited. Had he done so, the case must have gone to the jury. Then what power have we, sitting here, to enter a nonsuit, the point not having been made, or leave so to move reserved at the trial? No part of the rule calls on the plaintiff's attorney to pay the costs of the last trial.

The other Barons concurred.

Rule absolute for a new trial, without costs (*a*).

(*a*) In *Macarthy* v. *Smith*, 8 Bing. 145, (*H.* 1832). The declaration was for goods sold and money had and received. The bill of particulars annexed to the record was for goods sold only. It was not proved that particulars had been delivered to the defendant, pursuant to Reg. Gen. *Trin.* 1 W. 4, and the plaintiff's evidence was of money had and received by defendant to his use. *Tindal* C. J. nonsuited the plaintiff on the omission in the particular, saying, that since the late rule it was unnecessary for the defendant to prove the delivery of particulars, and that the defendant might fairly say, that had the claim relied on at the trial been stated on the particulars, he would not have gone to trial; and the court of C. P. refused a rule to set aside the nonsuit.

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## NOEL *against* WILLIAMS.

Affidavit to hold to bail was made by a clerk to *Lewis Joseph John* Noel, and stated a debt due from defendant to said *John* Noel. The *quo minus* stated the plaintiff to be *Lewis Joseph John Noel.*

*WHITCOMBE* moved for a rule to show cause why, on filing common bail, the sum of 70*l.*, lodged in the sheriff's hands in lieu of bail, should not

The court refused to suffer a sum paid into court in lieu of bail to be paid out to defendant on filing common bail.

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be paid over to the defendant, or to stay the proceedings. The motion was made on the day of the return of the *quo minus*. Its ground was a variance between the affidavit of debt and the *quo minus*. The former was sworn by a person described as clerk to *Lewis Joseph John Noel*, and stated that the defendant was indebted to the said *John Noel*. The *quo minus* stated the plaintiff's name *Lewis Joseph John Noel*.

*Per Curiam.*—No other person named *Noel* being mentioned, the plaintiff is sufficiently identified, and the defendant could not be misled.

Rule refused.

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## BROWN *against* EVANS.

A rule moved on 8 & 9 W. 3. c. 11. s. 6. against an executor, for a *scire facias* to show cause why damages should not be assessed and recovered on an interlocutory judgment signed twenty years ago against the defendant, his testator, who had since died, is a rule *nisi* only.

INTERLOCUTORY judgment having been signed against the defendant more than twenty years ago, but no writ of inquiry having been executed, and the defendant having since died,

*Manning*, in order to revive the judgment, moved under stat. 8 & 9 W. 3. c. 11. s. 6. for a rule why a *scire facias* should not issue against the executor of the defendant, that he might show cause why damages in such action should not be assessed and recovered by the plaintiff, and to hear the judgment of the court thereupon. The question being whether the rule should be absolute in the first instance,

BAYLEY B. said, that this motion being general for damages, without limitation of time, the plaintiff should be placed in no better situation as against the

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executors, than he would have been on his interlocutory judgment against the defendant.

Rule *nisi* only.

The other Barons concurred.

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## HADLEY *against* GREEN.

The plaintiff having a claim against the defendant for rent, and also for stone taken from a quarry, declared against him in debt for use and occupation, with a count for money had and received. By the particulars delivered it appeared that the plaintiff sought to recover a stated sum for the value of certain described quantities of stone. Before the trial the plaintiff commenced another action against the defendant in case for improperly quarrying stone, with a count in trover for stone, and delivered particulars claiming the same sum as before for similar quantities of stone. At the first trial the plaintiff confined his evidence to the claim for rent, and obtained a general verdict. At the second trial he had a verdict for the value of the stone taken away. —Held, that the plaintiff having distinct demands against the defendant, one of which was not advanced by him at the trial of the first action, the tort was not thereby waived, and consequently that the second action was not barred by any former recovery.

A SERVICEABLE *capias* had been issued out of the *Common Pleas*, at the suit of the plaintiff, against the defendant, returnable on 20 *May* 1831. In *Michaelmas* term 1831 the plaintiff filed his declaration there in debt, containing a count on 4 G. 2. c. 28. s. 1. for double value of a farm held over by the defendant, with counts for use and occupation, money had and received, and on an account stated. Notice of such declaration was served on the defendant, and the following particulars were annexed to it:—

"In the *Common Pleas*. Between, &c.

"This action is brought to recover *220l.* for five years' and a half double the yearly value of the premises mentioned in the declaration, from *Lady-day* 1825 to *Michaelmas* 1830, and under the indebitatus counts in the said declaration the plaintiff will seek to recover the single yearly value of the said premises, amounting to 110*l.*, during the same period, and also 452*l.* 15*s.* 3*d.*, being the value of the following materials taken from the said premises, and the profits whereof have been received by defendant to plaintiff's use, *viz.* to 613

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superficial yards of 6-inch curb stone, 626 superficial yards of blue lias pavement, 1671 cube yards or loads of lime, 313 superficial yards of mould and grass, one foot deep, and 1357 cube yards or loads of earth or rubbish.—Dated 4 *November* 1831."

This action was tried on 1 *February* 1832 at the *Middlesex* sittings after *Hilary* term, and a verdict was found for the plaintiff for 110*l.* on the count for use and occupation of the premises, no evidence being given on any other count. The verdict was taken generally, and not confined to any particular count of the declaration.

On the previous 23 *January* 1832 the plaintiff had commenced the present action on the case against the defendant; and the present declaration, containing a count for improperly quarrying and carrying away stone, &c., with counts for mismanagement of a farm, and in trover, was delivered to the defendant just before the first trial in the C. P. The following particulars were furnished:—

"In the *Exchequer of Pleas*. Between, &c.

"This action is brought to recover such damages as a jury shall think fit to give the plaintiff for and in respect of the causes of action fully and particularly set forth in the declaration in this cause; which damages the plaintiff estimates at 600*l.*: also to recover the sum of 452*l.*, being the value of the following materials taken from the premises mentioned in the declaration, and the profits whereof have been received by defendant to plaintiff's use, *viz.* 613 superficial yards," &c. &c. (as in the former particulars); "also to recover 150*l.* for injury done to the land and premises mentioned in the declaration, arising from the defendant's having ploughed the land without manuring, or by not manuring it properly, &c."

At the trial before *Gaselee* J. at the *Somersetshire Lent* assizes in 1832, the plaintiff's counsel abandoned

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the counts for injuries done to the premises, arising from the defendant's having ploughed the land without manuring it, &c., and confined his evidence to the counts respecting the stone. For the defendant an examined copy of the judgment in the first action was proved (*a*). It was also shown that the particulars of demand delivered in that action came from the plaintiff's attorney, and that no evidence was then offered, except on the count for use and occupation, and that the defendant and his witnesses examined on the second trial respecting the stone, were present at the first.

The only question left by the judge to the jury was, what quantity of stone the defendant had taken, and what its value was? The jury found a general verdict for the plaintiff, with 20*l.* damages. Leave having been given to move for a nonsuit, on the ground that the action was barred by the former recovery in C. P., and that the tort was waived by the statement in the particulars in the first action, that the plaintiff then sought to recover the value of the stone taken away under the counts for money had and received and on the account stated.

*Coleridge* Serjt. now moved to enter a nonsuit. The demand sought to be recovered in this action was made in the former suit under the count for money had and received by the defendant to the use of the plaintiff, for the value of stone of similar quantity, description and value; and the two bills of particulars describe the stone in a similar manner. [*Bayley* B. cited *Seddon* v. *Tutop* (*b*).] That case has been much shaken by several later decisions, and seems as if a verdict had been taken on one count only.

[Lord *Lyndhurst* C. B. Could the plaintiff recover under the counts for use and occupation and money had and received, for the injury accruing from sub-

(*a*) See *Stafford* v. *Clark*, 2 Bing. 377. (*b*) 6 T. R. 606.

verting the surface?] The quarry was only extended without injury to the surface, which disposes of the first count; and as that for mismanagement of the farm was abandoned, the verdict turned on the count in trover. [*Bayley* B. Particulars of demand (which are of modern date) only set forth what the plaintiff *may* go for at the trial, but do not make him liable to prove every item they may contain. The plaintiff is not bound to waive the tort, and if he discover before trial that he cannot recover for it in the form of action he is then adopting, *e. g.* assumpsit or debt, but that he could recover in case, he may seek his remedy in that form of action before trial of the former suit.]

The first verdict not being taken on the count for use and occupation only, but generally, it was not open for the plaintiff to contend that those damages were not given him on every count of that declaration. The first bill of particulars shows that plaintiff had determined to waive the tort, and to sue for the value of the stone under the count for money had and received. [Lord *Lyndhurst* C. B. The plaintiff could not there recover a full compensation for the cause of action here the subject of suit. *Bayley* B. The plaintiff afforded you no ground to imagine, when he tried the former cause, that he intended to abandon this, which had been only just brought.]

The plaintiff having once sued in a form of action in which his claims for stone might have been inquired into, as well as that for use and occupation, cannot now split his demand into parts, and try in a second action what he had voluntarily abandoned on the first trial: *Lord Bagot* v. *Williams* (*a*), *Dunn* v. *Murray* (*b*). The time for a plaintiff's election of action was complete when the defendant's situation was altered by incurring

(*a*) 3 B. & C. 235. (*b*) 9 B. & C. 780.

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costs in consequence of the representation held out by the plaintiff on the face of his first particulars.

The defendant has undergone the hardship of trials in town and country, the cause of action respecting the stone being the same in both cases, *Bowden* v. *Horne* (a), and has sustained a double expense, from the plaintiff's refraining to give evidence on that subject on the first trial.

Lord LYNDHURST C. B.—The question is, whether the second action is maintainable. That in this case depends on the nature of it, and the form of the record. Now *Bowden* v. *Horne* was an action on a bill of exchange, with counts for work and labour and goods sold. The plaintiff having obtained interlocutory judgment, chose to obtain a rule to compute on the bill of exchange only, and to waive his claim for goods sold and delivered, in order to avoid the delay of executing a writ of inquiry, which, if, as he then apprehended, the defendant was approaching insolvency, might have prevented him from obtaining any fruits of his judgment. The plaintiff in that case having elected to waive a claim, in order to suit a particular convenience, could not be allowed to sue the defendant again for goods sold, work and labour, &c.; which claim he might have previously asserted.

BAYLEY B.—The consequence to the plaintiff of producing evidence at the first trial in support of the count in debt for money had and received, would be, that if it had been sold at an undervalue he could not have impugned the sale, or sought to recover damages for a conversion in taking or selling the stone. The aggravation of expense in the two trials might be material were this a question of costs, or had a sum-

(a) 7 Bing. 716.

mary application been made to stay the second trial, on the ground of the former action having been brought (*a*). In *Seddon* v. *Tutop* the plaintiff had distinct demands, *viz.* on a promissory note, and for goods sold. And it being clearly shown to the court that the latter demand had been inadvertently neglected to be inquired into at the first trial as it might have been, it was held that he might bring a second action to recover it.

In *Bagot* v. *Williams* the sum recovered was satisfaction of the sums due up to the time of recovery. The plaintiff knew the defendant was indebted to him in the sum of 7000*l.* Therefore when he took a verdict for 3400*l.* that seemed an admission on his part that that sum was all which was then due. In *Dunn* v. *Murray* the plaintiff could not have varied the form of declaration for the cause of action arising from his wrongful dismissal, and must have had the same counts in both. Here he had originally a right to sue in trespass or case, and was not bound in the first instance to have declared in debt or assumpsit. A jury might give more in the action for subverting the soil than in that for the value of the stone. Then when would the time for the plaintiff's election of his remedy be complete? I am of opinion that it was not complete till the time of the first trial.

The other Barons concurred.

Rule refused (*b*).

(*a*) See cases collected Tidd, 9th ed. 528; 1st Supplement, 105.

(*b*) See the converse of this case, *Hitchin* v. *Campbell*, 2 Bla. R. 830.

## EVANS *against* MORGAN, MORRIS and JANE, his wife, (late REES.)

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In an action by payee against makers of a promissory note, it appeared that it had been given on an agreement by one of them to buy crops, &c. from an outgoing tenant. The note when made was handed to a third person to be attested by him, and paid over to the plaintiff on condition that possession of the premises should be given up to one of the defendants the next morning, but that the plaintiff was to hold the house for three or four weeks, paying one shilling a week rent. There was evidence of a verbal refusal by plaintiff on the next morning to give up possession, but the defendant's cattle were seen on the land on that day and remained there. Possession of the house was not obtained till three weeks after. The note when produced did not appear to have been attested, and there was no evidence how the plaintiff had got possession of it:—Held, that as no *act* was shown to have been done by the plaintiff to keep possession of the land, the jury might rightly conclude that possession had been delivered up according to the condition; and that the misconduct of the bailee of the note in withholding his attestation to it, or not delivering it to the plaintiff, was no defence to the action thereon.

ASSUMPSIT on a promissory note for 30*l.* dated 9th *October* 1829, made by the first named defendant *Morgan* and *Jane Rees* dum sola, payable to the plaintiff at three months. At the trial before *Bolland* B. at the *Camarthenshire Lent* assizes, the following appeared to be the facts. The plaintiff having long lived with his grandfather, the tenant of a house and farm, kept possession of it after the death of the latter. The farm was let to the defendant *Morgan* by *Davis*, as agent for the landlord. It appeared on the cross examination of the plaintiff's first witness, an auctioneer, who was present when the note was made, that the plaintiff, at the suggestion of *Davis*, agreed to sell the crops, manure, &c. on the farm, to the defendant *Morgan* for 30*l.*, and that *Morgan* agreed to purchase it at that rate provided the plaintiff would give him as incoming tenant quiet possession next morning. The plaintiff was however to remain in the house for two or three weeks, paying one shilling a week rent to the defendant *Morgan*. The note in question was then written by *Davis* and signed by the defendant *Morgan*, and by *Jane Morris* (then *Rees*) as surety; but *Morgan* doubting whether he should be permitted by the plaintiff to take possession of the farm as stipulated, handed over the note to *Davis*, the landlord's agent, to be delivered to plaintiff on performance of the condition to deliver up possession of the farm the next morning,

so that *Davis* could place *Morgan* in possession. The note was to be attested by *Davis* if he paid it over to the plaintiff according to this arrangement. There was evidence that on the next morning *Davis* and the defendant *Morgan* requested the plaintiff to give up possession to them, and that he said he would not; but there was also proof that the defendant *Morgan*'s cattle were seen on the farm that morning, and that none of the plaintiff's stock were there. Possession of the house was not obtained till three weeks after by aid of a constable. *Davis* never attested the note, and there was no evidence how the plaintiff got possession of it. The proof of the defendant *Morris*'s marriage to *Jane Rees* was by a person who, being neither a neighbour or relation, said he had known *Jane Rees* and the defendant *Morris*, and had heard they had since married.

Two points were made for the defendant; First, That the note was put into *Davis*'s hands conditionally; so that had it been a deed it would have been an escrow to be kept till the condition of delivering up possession of the whole premises had been performed by the plaintiff; and that there was no evidence by *Davis*'s attestation or otherwise to show that *Davis* had pursued the authority given him for delivering the note to the plaintiff; but on the contrary, it appeared that the plaintiff had broken the condition by his refusal to deliver possession when requested at the stipulated time. Secondly, The evidence as to the marriage only implied that the defendant *Morris* was reputed to be married, not that he was married to her.

The plaintiff had a verdict for the amount of the note with leave to move to enter a nonsuit.

*Maule* now moved accordingly on the above points. As to the second, Lord *Lyndhurst* C. B. said, that if

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the defendant's counsel at the trial did not sift or cross-examine the witness who gave the evidence of the marriage, it would sufficiently import to a jury that *Jane Rees* was at the time of the trial *Jane Morris*, and that the defendant *Morris* had married her. *Bayley* B. added, that from the evidence as it stood, the reputation of the neighbourhood that they lived together as man and wife must be implied. *Maule* also moved for a new trial on the ground of misdirection. It was left to the jury to say, Whether the consideration for the note had wholly failed or not; that if it had, the plaintiff could not recover; but that if the jury thought that the defendant had had the crops &c., no misconduct of *Davis* in dealing with the note improperly would prevent the plaintiff from recovering upon it. He submitted that this was a misdirection, for that in order to enable the plaintiff to sue on the note there must be a delivery of it to him in a particular manner, or it would be no delivery by the defendants, and that no evidence was given that *Davis* had pursued his authority as to delivering the note. The court granted a rule on all the points.

*John Evans* showed cause. As to the first point, the question whether the condition on which the note was to be given to plaintiff had been fulfilled, was a question for the jury. The answer to the alleged misdirection is on the evidence, viz. that the defendant *Morgan* took possession of the land next day, but that the house was not given up for three weeks after; which at utmost, and in the absence of the evidence that the plaintiff was to be suffered to hold it for three weeks, would only be a partial failure of consideration. The point as to the marriage has been disposed of by the court.

*Whitcombe* in support of the rule. If the condition

on which the note was delivered over to *Davis* has not been complied with, it is not duly delivered to plaintiff.

[Lord *Lyndhurst* C. B. The condition is performed, and *Davis* would therefore have been liable to an action for not delivering up the note to the plaintiff. Then could his wrongful act in not so delivering it up be a defence to this action? It was for the jury to say whether the condition had not been performed.]

The condition was broken by the plaintiff's refusal to quit possession the next morning after the note was given, and *Davis* had no authority afterwards to give up the note. It might have been worth while to give the note in order to obtain immediate possession of the whole.

[*Bayley* B. The question is, Whether there was any refusal the next morning to deliver possession. The evidence of one witness, that the defendants were to have possession " of the place," is equivocal, it might be house and premises, or either. It does not appear that the plaintiff had any thing on the land after the time agreed on for giving it up. *Vaughan* B. The question of refusal was a question for the jury. The defendant's cattle being on the land from day to day would go to contradict such a presumption.]

The defendants went to the house to ask for possession, it was refused by plaintiff generally, but he assigned a reason only applicable to the land.

[Lord *Lyndhurst* C. B. Suppose the plaintiff had refused to give possession the next morning, but that in an hour after, the situation of the defendants not having been altered, possession had been offered them and accepted accordingly, would that not have been within the agreement, or would the prior refusal establish a defence ?]

The averment that the bill was delivered to plaintiff, though unnecessary to have been made, should have

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been proved. Now if the condition was not complied with, the delivery is not justified, and the note is no note, nor could plaintiff recover till *Davis* attested.

On the ground of misdirection. If the consideration for the note, viz. the crops, manure, &c. have not passed to the defendant, there is an entire failure of consideration. [*Bolland* B. I left it to the jury to say whether or not possession was given up.]

The true question was not that merely, but whether he had had possession at the time, and in the manner in which he was entitled to have it.

Lord LYNDHURST C. B.—The summing up of the learned judge amounts to this, Was the bargain completed? If it was, the plaintiff was not to suffer by the misconduct of *Davis*.

The question whether the farm was delivered up on the following day was a fact for the jury, and the balance of the evidence is in favour of their verdict.

As to the marriage of the defendants, there was sufficient evidence of their living together as man and wife.

BAYLEY B.—There was sufficient *primâ facie* evidence of marriage uncontradicted. It was not put to the judge at the trial that the marriage was not proved, but ingeniously to the jury that there was no evidence of the marriage. The real merits of the case are, that at a meeting at a public-house on the 9th *October*, a bargain took place between the incoming and outgoing tenants. *W. Morgan* and *Jane Rees* were to give a note for the plaintiff's crops, manure, &c. on this condition, that possession was to be delivered up to the defendant *Morgan* by *Davis* on the following morning. There was strong evidence on that point, for *Morgan*'s cattle were seen on the premises the next morning, and were there from day to day afterwards, while the plain-

tiff had no stock there. It is true, that it appears from the evidence of the constable *Sanders*, that the plaintiff was turned out of possession of the house, but whether of more than the house or of any part of the land did not appear. It was not in evidence that he did any act to keep possession of the land. Nor was it part of the bargain that he should be turned out of the house, but he was to keep possession of it for three or four weeks on paying one shilling a week.

No doubt delivery of the note by the defendant to an agent for himself and the plaintiff, would be delivery to the plaintiff, provided that those circumstances afterwards existed which would warrant actual delivery to the plaintiff. The plaintiff's right to sue on the note would not be gone, if he had done all in his power to give up possession. After the finding of the jury it appears the wrongful act not of the plaintiff, but of *Davis*, that attestation of the note was withheld.

VAUGHAN B.—I am of the same opinion. The conclusion to which the jury have come may be supported. The reputation of marriage not having been made the subject of cross-examination, there is sufficient *primâ facie* evidence of the marriage. As to the fact of the delivering up of possession on the following day, the evidence of the plaintiff that it was so given up predominates. The fulfilment of the condition on which the delivery of the note was to depend was for the jury; and if it was performed, *Davis* was bound to give up the note to plaintiff. It is clear that the case was left to them on the only ground on which it could be left.

BOLLAND B. concurred.

Rule discharged.

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JONES, Gent. One, &c. *against* BYWATER.

The application to tax an attorney's bill for business done in suing out and prosecuting a commission of lunacy should be made to the Lord Chancellor, though after action brought on the bill in a court of law.

Whether a bill for such charges is taxable under 2 G. 2. c. 23. as for charges in law or equity, *quære.*

*THESIGER* had obtained a rule to refer to the master for taxation a bill of costs amounting to *2726l.* incurred in suing out and prosecuting a commission of lunacy, and in various other proceedings ineffectually instituted by the defendant in order to establish the lunacy of one *Davies*, on the ground that the items for the expenses of proceedings previous to commission issued were on the common law side of the court of chancery, viz. in the petty bag office (*a*), and therefore taxable as charges &c. "at law" within 2 G. 2. c. 23. s. 23.

*D. Wakefield* showed cause. The question is, Whether these are proceedings at law or in equity taxable within the statute. In *Wilson* v. *Gutteridge* (*b*) the court of *K. B.* laid it down that a court has a paramount jurisdiction independently of that statute to refer an attorney's bill for taxation. But though Lord *Tenterden* adhered to that case when cited in *Dagley* v. *Kentish* (*c*), *Littledale* J. differed, and on conference with the other judges, so much doubt was entertained on the point, that *Wilson* v. *Gutteridge* was not relied or acted on.

But these proceedings are not in equity. A bill for business done in order to the suing out a commission of bankrupt is not taxable, *Burton* v. *Chatterton* (*d*). Now these items stand on no different footing, for as in bankruptcy the chancellor sat under a separate commission (*e*), so in lunacy he acts under another authority, distinct from the custody of the great seal, viz. a warrant under the sign manual. That authority

(*a*) 3 Bla. C. 48, 49. 427.
(*b*) 3 B. & Cr. 157; and see *post*, 408, n. (*a*).
(*c*) 2 B. & Adol. 412, *post*, 408, n. (*d*) 3 B. & Ald. 486.
(*e*) *Ferd* v. *Webb*, 3 Brod. & Bing. 241.

has been committed by the crown to other great officers of state, besides the lord chancellor, *e.g.* the lord treasurer (*a*). The king may commit the custody of a lunatic to whom he pleases, and on the application of unprofessional persons. [Lord *Lyndhurst* C. B. Application for a commission of lunacy is made to the chancellor on affidavits, and I do not personally remember any instance of such an application except through the medium of a solicitor. This is certainly not a proceeding in equity.]

Nor are these proceedings at law. In order to obtain a commission of review from the privy council it is usual to apply to the chancellor to report to the king. When that commission is granted, it would be issued by the chancellor in the same manner as a commission in lunacy, both being granted under the great seal, which is in his custody. So an appeal to the House of Lords is a proceeding neither at law or in equity (*b*), and the costs are therefore not taxable under the statute 2 Geo. 2. Looking at that act, it contemplates proceedings in some court, or brought with a view to such proceedings; but this is a proceeding to a commission. The writ *de lunatico inquirendo* has not been issued for many years. [Lord *Lyndhurst* C. B. The commission issued in order to an inquisition by jury partakes of the nature of that writ.] In inquiries in lunacy there is no view to adverse litigation in any court, and successive chancellors have declared the proceedings on all sides to have but the single object of ascertaining the state of mind of the party, though counsel appear on either side, to establish and support contradictory facts relating to that subject. Proceedings before the chancellor as visitor of a royal charitable foundation are on affidavits, which are entitled and filed in chancery: but yet are not taxable, though the chancellor, as such, has per-

(*a*) *Wigg* v. *Tiler*, 2 Dickens's Ch. R. 553. (*b*) 4 Pri. 279.

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sonally power *virtute officii* to superintend all charitable uses. *Ex parte Dann* (*a*).

If a bill were taxable, because the great seal would be applied to the object for obtaining which the costs have been incurred, the costs of every application for a writ, patent, or commission, which issues under it, would be taxable as proceedings in law or equity. The mere fact of applying the great seal establishes nothing, and the clear intent of the act was to provide for cases where there is actual litigation at law or in equity, but for no other.

*Thesiger* contrà. This is a proceeding for charges and disbursements at law, and as such, was taxable within the statute, so that it is unnecessary to discuss the weight of the conflicting authorities of *Wilson* v. *Gutteridge* and *Dagley* v. *Kentish*. *Blackstone* states that a commission of lunacy issues from that part of the *officina justitiæ* in the court of chancery, on its common law side, called the petty bag office (*b*), in lieu of the old writ *de lunatico inquirendo*; but the proceedings in order to obtain it partake of the nature of that writ, in empowering a jury to be summoned in order to ascertain whether the party be of sound mind or not. The inquisition thus taken is returned into the petty bag office; nor can the proceedings before that commission, if erroneous, be redressed but by writ of error in regular course of law (*c*). Thus the distinction is between the first commission to proceed by inquisition to the finding him lunatic or not (*d*), and the subsequent grant to a committee of the custody of the person if the party be found lunatic. In the latter case, the remedy against the chancellor's appointment of a committee is by appeal to the king in council (*e*). Yet the writ of error at law, to which the previous proceedings are subject,

(*a*) 9 Ves. J. 547. (*b*) 3 Comm. 49.
(*c*) 3 Bla. C. 427. (*d*) Ibid. (*e*) *Sheldon* v. *Aland*, 3 Peere W. 108.

affords an answer to the course of proceedings in chancery in matters of charity, which are neither in law or equity, and can only be redressed by the king in council.

The decision in *Burton* v. *Chatterton* (*a*) turned on the affidavit of the petitioning creditor's debt not having been *sworn* in order to obtain the commission, nor did the commission issue. And *Holroyd* J. puts it on its not having gone on to the extent of swearing the affidavit.

*Collins* v. *Nicholson* (*b*) had previously decided, that where a commission of bankrupt had issued and had been proceeded on till the chancellor's signature to the certificate had been obtained on application, the bill for obtaining it was held taxable, because it contained one item (*c*) for that application, which was a proceeding in a court. It is difficult to distinguish those cases from the present. [Lord *Lyndhurst* C. B. The lunatic may traverse the inquisition *de jure*, which causes the fact to be tried at law (*d*). Inquiry into a person's sanity may be made by writ or commission. It is most usually, because most conveniently made by the latter mode, but it is clear that if made by writ, it would be a proceeding "at law." Is it usual to apply to the chancellor for his order for taxation of bills in lunacy?]

*Wakefield* stated that he knew no instance of such an order between a party suing without effect for a commission and his attorney, but that where a bill of costs were to be paid out of the lunatic's estate it would be referred to the master for taxation.

*Cur. adv. vult.*

(*a*) 3 B. & Ald. 486. (*b*) 2 Taunt. 321; and see 5 Ves. 706; 6 ib. 425. (*c*) *Sandom* v. *Bourne*, 4 Campb. 68; but doubted in 3 B. & Ald. 486. 488; 1 B. & C. 86. (*d*) 2 & 3 Ed. 6. c. 8. s. 6. See 5 Ves. J. 450. 452.

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On a subsequent day, Lord *Lyndhurst* said—The course adopted in order to obtain a commission of lunacy is this; a petition for the commission is in the first instance presented to the lord chancellor supported by affidavits, which are filed in the petty bag office. Office copies, when necessary, are delivered out from thence. The commission, if granted, issues from the office of the clerk of the custodies; but the inquisition, when taken, is returned into the petty bag office. Upon that return the other party may, on application to the chancellor by petition, traverse the inquisition. That traverse is heard in the King's Bench, and the proceedings are then again returned into the petty bag office. It is unnecessary to decide in this instance whether the bill for these proceedings be taxable or not, for if it is, the lord chancellor has jurisdiction to refer the bill; and it would be better taxed by his officers in their accustomed course. That appears the preferable method, as they are more likely to be conversant with the subject of costs in lunacy. This application should have been originally made to the lord chancellor in preference to this court.

Rule discharged.

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## WATSON *against* POSTAN and Another.

The court has an inherent jurisdiction to tax the bills of attornies practising in it, independently of the powers given by statute 2 G. 2. c. 23. s. 23. in cases where no actions have been brought on such bills. Therefore where an action was pending on an attorney's bill against two defendants, and a baron at chambers, on application by one of them, made an order for taxation without imposing the terms of an undertaking to pay the sum found to be due, the court refused a rule to rescind the order to impose such terms, for the order was made at common law and not under the statute.

AN action having been brought by an attorney against two defendants for the amount of his bill, a

baron made an order at chambers for its taxation, on application on behalf of one defendant (*Postan*) only, without requiring an undertaking from him or his attorney to pay the taxed costs.

*Busby* moved for a rule to show cause why the order should not be rescinded, or why *Postan* should not enter into the usual undertaking to pay the whole sum found due on taxation. *Tidd* (9 ed. 325) says, It should seem that before the stat. 2 G. 2. c. 23. s. 23. an attorney's bill could not have been taxed unless an action was depending thereon, nor without bringing the amount of it into court. Parties indebted to attornies acquired by that statute the advantage of taxation, without bringing the amount into court, on their giving, as an equivalent in return, their undertaking to pay the costs ascertained to be due, a security which might be enforced by attachment. This order however gives the defendant the benefit conferred by the statute, viz. the taxation and all the time occupied in it, without securing to the plaintiff the ultimate payment of his taxed costs, the result of that investigation.

By this order a party who did not tax the bill under the statute within the month after its delivery, and before the action is brought, thus repudiating the course pointed out by the statute, will obtain the benefit of taxation and delay the plaintiff accordingly for a longer period, without giving any equivalent for that advantage.

Lord LYNDHURST C. B.—What was the course before the statute 2 G. 2. c. 23. when an action on an attorney's bill being pending, the court ordered costs to be taxed? In this case, such an action having been brought, the order for taxation was made under the general jurisdiction inherent in the court, independently

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of any act of parliament (*a*). Then the proceeding not being under the statute 2 G. 2. c. 23. the court may mould the terms of its order as it thinks proper. I see no objection to making an order for taxation where an action is depending, though without the terms of an undertaking by the defendant to pay the amount found to be due.

BAYLEY B.—The passage cited from Mr. *Tidd* does not say that taxation taking place after action brought by an attorney for his bill, who before doing so has waited a month from its delivery, is not at common law. If a bill is taxed before an action brought, the statute is acted on; but such taxation after action brought, takes place by the authority possessed by the court previous to the statute. This action being against two defendants, one of them may say, I dispute my liability to pay in toto; but at the same time I do not wish to be excluded from the benefit of ascertaining its possible quantum by taxation.

The other barons concurring,

Rule refused.

(*a*) Ex parte *Arrowsmith*, 13 Ves. 124. Also *Rex* v. *Bach*, 9 Pri. 354; Anon. 2 Chit. R. 155; *Wilson* v. *Gutteridge*, 3 B. & C. 157, cited by Lord *Tenterden* in *Dagley* v. *Kentish* 2 B. & Adol. 412, acc.; but see the latter case contra.

SINGLETON, Executor, *against* BALLOT. 1832.

DEBT by an executor on an account stated by the defendant with the testator. The particulars of demand delivered to the defendant and appended to the record were as follows:—

1827, *April* 5. To amount of account stated between the deceased and the defendant as appears by a memorandum of this date under the defendant's hand, 11*l.*

At the trial before *James Parke* J. at the *Lent* assizes for *Nottinghamshire*, a book was produced for the plaintiff containing the memorandum alluded to. It was an entry signed by the defendant, by which he promised to pay 11*l.*, due from him to the testator, by monthly instalments of 1*l.* each. The defendant's counsel objected that it was inadmissible in evidence, not being stamped as a promissory note.

The learned judge having rejected the evidence of the entry, then asked the witness what took place between the parties at the time of making the entry in the book. He answered, that before any thing was written by the defendant, he had verbally promised the plaintiff's testator to pay him the debt he owed him by instalments of 1*l.* a month, for eleven months; and that on that proposal being acceded to, he signed the entry in the book. On this evidence, the jury, under the direction of the learned judge, found a verdict for the plaintiff.

To prove the defendant's admission of a debt due, the plaintiff produced a book containing a written entry signed by the defendant, but which, being couched in the terms of a promise to pay, was rejected for want of a stamp. Held, that a verbal admission by the defendant of the amount of the debt due from him to the plaintiff, and made before, or cotemporaneously with, his signing the entry, was properly admitted in evidence.

*White* now moved for a new trial, on the ground that the parol evidence of the witness as to what conversation took place before or cotemporaneously with the time of making the written entry was improperly admitted in evidence. [*Bayley* B. It was evidence of an account stated.] But it was not the species of evidence

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represented in the particulars, and which the defendant accordingly came prepared to meet, viz. "a memorandum under the defendant's hand." [Lord *Lyndhurst* C. B. The item in the particular merely amounts to a statement that the defendant's admission will appear by the evidence of a witness.]

*Jacob* v. *Lindsay* (*a*) is distinguishable; for there the verbal admission by the defendant of each item being due as separately called over from the plaintiff's book took place long *after* the defendant had also signed entries of "Received the contents," written on the several pages containing the items so afterwards called over, and cash items amounting to 40*s*., and therefore requiring a stamp. Whereas here the parol admission of the defendant took place at a time before, or at all events strictly cotemporaneous with, his signing the written memorandum of his promise. That memorandum thereupon became the only evidence of the preceding verbal matter.

Lord LYNDHURST C. B.—I have no doubt that the defendant's declaration on the subject of the amount due by him to the plaintiff and made at the time of his signing the entry was properly admitted in evidence. The testimony of a witness present at the payment of money is admissible to prove that fact, though a receipt has been also given, which cannot be read for want of a stamp.

The rest of the court concurred.

Rule refused.

(*a*) 1 East, 460.

See *Rambert* v. *Cohen*, 4 Esp. 213. *Maugham* v. *Hubbard and Another*, 8 B. & Cr. 14,

## Cox *against* THOMASON.

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CASE for malicious prosecution and for two sets of slanderous words respecting the loss of a portmanteau. A portmanteau containing money belonging to the defendant having been stolen from his house, he charged the plaintiff, a neighbouring butcher, before a magistrate, with the felony. The charge was dismissed, and this action was brought. There were in all eighteen counts: nine for malicious prosecution, three for one set of words, and six for the other.—The defendant had a verdict on the counts for the malicious prosecution, and on the set of six counts for words. The plaintiff had a verdict for 40s. on the other set of three counts; one of them (the tenth) contained an inducement referred to and adopted by the other two, that a portmanteau of the defendant containing his money had been stolen from him: the eleventh count stated that in a certain discourse which the defendant had with, and in the presence of one *Joseph Guildford*, and of other subjects, &c. who knew and had heard of the premises, and of and concerning the plaintiff, and of and concerning the said money (in the said tenth count mentioned), and of and concerning the said *J. G.*, *and of and concerning certain meat of the said J. G., which he had before then purchased of the said plaintiff, who had before then purchased the same of certain other persons, and had paid for the same*, the said defendant then and there, in the presence of the said *J. G.*, and of the said other subjects of the realm, spoke and published to the said *J. G.*, *and of and concerning the said meat*, the words following, that is to say, "Where did you (meaning the said *J. G.*) buy that meat?" (meaning the said meat of the said *J. G.*) to which the said *J. G.* then and there answered and replied in and

In a declaration for slanderous words the stating an immaterial fact in the inducement does not render it necessary to be proved, if the words themselves support the imputation complained of.

By *Reg. Gen. Hil.* 2 W. 4. No. 74, a defendant is entitled to deduct the costs of issues on counts found for him from the plaintiff's costs on the other counts, whether the general issue be pleaded to the whole declaration, or whether issues are joined on several pleas.

Taxation of costs incurred before the first day of Easter Term 1832 is governed by *Reg. Gen. Hil.* 2 W. 4. No. 74. though it is not had till after that day.

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spoke and published in the presence and hearing of the said subjects, of and concerning the said plaintiff, and of and concerning and relating to the said meat, and of and concerning himself the said *J. G.*, in the words following, that is to say, " Of butcher Cox," (meaning the said plaintiff,) and meaning that he the said *J.G.* bought the said meat of the said plaintiff, whereupon the said defendant further contriving, &c. in the presence, &c. spoke and published the following false words of and concerning and relating to the said meat, and of and concerning and relating to the said plaintiff, and of and concerning and relating to the said money in the introductory parts of the tenth count mentioned, that is to say, " It's devilish hard that people should stuff their guts with meat that my money (meaning the money in the introductory part, &c. mentioned) has paid for," (meaning that the said plaintiff had feloniously stolen the said money, and had paid for the said meat with the same.)

*Crowder* moved to set aside the verdict for the plaintiff, and for a new trial. Every count which has been found for the plaintiff expressly states, in the inducement applicable to it, that *Guildford* had bought the meat respecting which the slanderous words were charged, from the plaintiff, who had previously bought it from other persons, and had paid for it. Now this allegation, that the plaintiff so bought the meat, was not proved: but having been stated in the inducement, and words having been subsequently laid in such count to have been spoken " of and concerning the said meat," thus referring to the inducement, it became material to be proved. And the imputation intended to be ascribed to the defendant was that it had been paid for by the plaintiff with money stolen from the defendant. In *Shepherd* v. *Bliss* and

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*wife* (*a*), the words were laid to have been spoken by the wife of and concerning certain soap which her husband, the other defendant, had asserted to have been *stolen* out of his yard, and to have charged the defendant with stealing it. The evidence was, that before the speaking the words sued for, the husband had asserted that the soap had been *taken* out of his yard, and *Abbott* C. J. thought the variance fatal.

BAYLEY B.—It is probable that in the case cited the words used were, that "the plaintiff *took* the soap," and if so, that those words might not bear out the charge of stealing there imputed, unless they were made out as stated in the inducement. The pleadings in that case do not clearly appear. Here the substantial allegation is that *Guildford* bought from the plaintiff, *Cox*, and it may be collected from the words themselves, without referring to the inducement, that the charge was made concerning the money stolen from the defendant. Now the proof should be confined to what is material, and I do not apprehend that the omission to prove a fact unnecessarily made part of an inducement will be a fatal variance, if the words themselves will sustain the action without it.

The rest of the Court concurred.

Rule refused (*b*).

The entry on the postea was, guilty on the 10th, 11th, and 12th counts, damages 40*s.*; not guilty as to the other counts. The master in this term taxed the plaintiff his costs on those counts on which he had ob-

(*a*) 2 Stark. C. N. P. 510.

(*b*) See *Hall* v. *Smith*, 1 M. & S. 287, and *Figgins* v. *Cogswell*, 3 M. & S. 369.

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tained a verdict, but allowed him none on the counts found for the defendant, and did not suffer the defendant to deduct the costs of those issues from the plaintiff's costs.

*Crowder* obtained a rule to show cause why the master's taxation should not be set aside and reviewed, and why execution and other proceedings should not be staid in the meantime, and why the costs of the 1st, 2d, and 3d counts found for the defendant should not be allowed him, and deducted from the costs payable to the plaintiff, on the 10th, 11th, and 12th counts found for him. (*a*)

*Erle* showed cause. The new Rule provides, first, that "no costs shall be allowed on taxation to a plaintiff upon any counts *or* issues on which he has not succeeded;" and secondly, that "the costs of all *issues* found for the defendant shall be deducted from the plaintiff's costs." A distinction is therefore drawn between counts and issues, and nothing is said except as to costs of the latter actually found for the defendant. Here as not guilty was pleaded to the whole declaration only one issue was raised for trial. [*Vaughan* B. Is not this substantially a plea to each count?] Before the late rule, whether several counts embraced several causes of action, to which there were several pleas, raising several issues, or whether one cause of action was stated in several counts to which there was one or more pleas, the defendant was never allowed his costs on the issues found for him, though the plaintiff recovered on one count only (*b*). [*Bayley* B. The new general rule of all the courts was framed to meet that

(*a*) Another part of the rule applied to the costs allowed to the plaintiff for six witnesses called to support the counts for malicious prosecution and words which had been found for the defendant, but was ultimately referred to the master.

(*b*) Tidd, 9th edit. 971.

state of the law.] That rule however recognises in terms that if there be only one issue, part of which is found for the plaintiff, the defendant shall not have his costs deducted. The "*issues* found for the defendant," the costs of which are to be allowed by the plaintiff, are confined to issues raised on several pleas requiring different classes of evidence, *e. g.* rights of way, &c. variously pleaded. If the general issue is held divisible as to each count on which the defendant gets a verdict, so as to entitle him to deduct the costs of the issues on those counts from the plaintiff's costs, it will follow that if a single cause of action be made the subject of several counts and the general issue be pleaded, then if the plaintiff obtains a verdict on one count only, he must allow the defendant his costs of the rest, though he could not prudently omit them.

[*Bayley* B. No costs would be incurred by the defendant on those counts. Thus if to a declaration containing a count on a bill, the money counts are added, and the general issue is pleaded, but no evidence is given on the money counts, they become mere incumbrances in the event of success on the bill, but the defendant has been put to no expense about them; whereas on the contrary, where on substantive issues, a plaintiff succeeds on some and fails on others, the defendant's right to deduct his costs stands on a different footing of expense incurred in adducing evidence.]

It may happen that if several causes of action were contained in one declaration, and two were found for the plaintiff, that found for the defendant may be the more expensive, so that the defendant might claim larger costs than those taxed to the plaintiff.

[*Bayley* B. Possibly the court might say that the defendant might deduct so far as to swallow up all the plaintiff's costs, but that he should obtain no further costs. Here the defendant says that he is entitled to

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deduct, by way of allowance to himself, the costs of those counts on which the plaintiff has not succeeded, and wishes to treat the costs as if instead of pleading not guilty generally, he had pleaded it severally, viz. "as to the 1st," then "as to the 2d, &c. counts"]— Secondly, as to the costs incurred before issue joined. The rule of court, according to which taxation has been had, did not take effect till the first day of this term, and can have no retrospective operation on them.

*Crowder* contrà. This case is within the mischiefs provided against by the general rule cited. There was no distinction between counts relating to the same or different causes of action; the plaintiff, if unsuccessful, was equally unentitled to receive costs of those counts from the defendant, nor could the defendant claim or deduct his costs of them from the plaintiff's. It was a hardship on defendant that if the plaintiff succeeded on one only out of many counts grounded on one cause of action, the defendant's expenses in preparing to defeat the rest could not be obtained; but the hardship was greater where many different causes of action were stated and one only succeeded, for the defendant was at the expense of adducing evidence to resist all those on which no ground of action whatever existed. The present is a case within the purview of the new rule, and the issue is not single or indivisible, but arises on a plea which is substantially a plea of not guilty of all *or any* of the grievances laid in the declaration. The finding, therefore, on such a plea is on as many several issues as there are counts, or this inconvenience must follow, that several pleas must be pleaded as to the 1st count, as to the 2d count, &c. so as to raise the most possible issues. As to the difference in the terms of the two branches of the rule, the word *counts* was neither necessary to be added to *issues* in

the latter branch, nor, had it been added, would it have been applicable there.

The case stood over till an early day in *Trinity* Term, when judgment was delivered as follows:

BAYLEY B.—This was a case in which the question turned on the construction of the *Reg. Gen.* Hil. 1 W. 4. No. 74, and cause having been shown on the last day of last term, we abstained from deciding it then, in order to have an opportunity of consulting the other judges. By the rule cited no costs are to be allowed on taxation to a plaintiff upon any counts or issues on which he has not succeeded, and the costs of all issues found for the defendant are to be deducted from the plaintiff's costs. In this case there were nine counts for malicious prosecution, and nine for two sets of words; of these eighteen counts three were found for the plaintiff for one set of words, and all the rest for the defendant. The master allowed no costs to the plaintiff on the counts so found for the defendant, and so far was clearly right; but he allowed no deduction to the defendant in respect of such costs. The question therefore was, Whether under the above rule of the courts the defendant was entitled to have such deduction made? On showing cause it was urged that he was not, on two grounds: first, that costs could only be deducted for the defendant where distinct issues are joined on distinct pleas, and that the general issue was here indivisible; secondly, that the rule not having come into operation till the first day of *Easter* term did not apply to those costs incurred previously. All the courts have, however, agreed in opinion that a distinct issue is raised on each count by the general issue pleaded without restriction, and therefore that the defendant is equally entitled to a deduction from the plaintiff's costs in respect of counts found for him, as if

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issue had been joined on each of those counts by pleading separately to each. As to the other point we are decidedly of opinion that the new general rule applies to every taxation which took place after the commencement of *Easter* term last. The court of *King's Bench* decidedly agreed with us in this construction, and the court of Common Pleas did not differ, though not entertaining our opinion so strongly as the fomer court.

Rule absolute.

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## Harris and Another *against* Allcock.

Bail above having been put in, the defendant, who resided at *Birmingham*, became bankrupt and surrendered to country commissioners; and on affidavit of the inconvenience to them of attending the bankrupt in prison in *London* or at *Warwick*, the time was enlarged for his render by the bail till after the day fixed for his final examination.

Such application may be made by creditors of the bankrupt.

*Thesiger* moved for a rule to show cause why the defendant's bail should not have time given them to surrender till a week after he should have passed his final examination under the commission of bankrupt, with stay of proceedings in the mean time. He stated, that the motion was made on behalf of the creditors in case of the bankrupt's estate, and not by the bail.

The affidavits showed, that a writ had issued out of this court against the defendant, who resided at *Birmingham*, that two persons named executed a bail bond to the sheriff of *Warwickshire*, and that the defendant was thereupon discharged from the sheriff's custody. That a commission of bankrupt had afterwards issued against the defendant on the 31st December last, directed to commissioners residing in the neighbourhood of *Birmingham*, and that it was opened at that place on the 12th *January*. That the defendant was thereupon declared a bankrupt, and surrendered to

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the commissioners, who allowed him time for passing his examination till the last sitting, to be fixed in the Gazette. That that last sitting was so fixed for 24th *February* 1832, at *Dee*'s hotel *Birmingham*. That in the deponent's belief, the bail, at the time of making the affidavit, had it in their power, and were ready to surrender the defendant, and that, if the application should be refused, would surrender the defendant in their discharge.

It was urged, that if the defendant should be rendered in *London* before the day appointed for his final examination, extra expense would be incurred by his estate, in bringing the country commissioners to the prison in *London* to take the examination, or in conveying the bankrupt to *Birmingham* and back under their warrant. In *Crump* v. *Taylor* (*a*), the court granted a similar motion, though, as the bankrupt there was a prisoner in *execution*, the commissioners were empowered by the express terms of 49 G. 3. c. 121. s. 13. to issue their warrant for bringing him before them. *Maude* v. *Jowet* (*b*) and *Glendining* v. *Robinson* (*c*), were there relied on in favour of the application, as showing the practice of the courts before the statute 49 G. 3., when even the cheaper alternative of bringing a bankrupt before the commissioners was not within reach. By 6 G. 4. c. 16. s. 119., the now repealed provision of 49 G. 3. has been replaced, and much extended by empowering commissioners to cause a bankrupt to be brought before them out of custody on whatever process he may be confined.

BAYLEY B. (alone).—The cases cited occurred before 11 G. 4. and 1 W. 4. c. 70. s. 21. allowed a render to

(*a*) 1 Pri. 74, setting out a form of rule. (*b*) 3 East, 145.

(*c*) 1 Taunt. R. 320. See also 6 M. & S. 348, *Offley* and Others v. *Dickens*; both which cases state the terms of granting that rule.

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be made to the gaol of the county where the arrest takes place, and proceeded upon the ground of avoiding the inconvenience of commissioners attending to take examinations in the *London* prisons. In this instance, the county gaol is not far distant from *Birmingham;* therefore, as the time for rendering does not expire till the last day of the term, and the bail cannot be fixed till then, this motion may be adjourned till it can be ascertained, whether an affidavit can be made, stating that it is inconvenient to the commissioners to attend either at the gaol in *Warwick* or in *London*.

An affidavit to that effect having been afterwards procured, the rule was granted for enlarging the time for render till four days after the day appointed for the final examination of the bankrupt; Lord *Lyndhurst* C. B., adding, that it made no substantial difference, that the application was made on behalf of the creditors and not of the bail.

No cause was shown, and the rule was made absolute (*a*).

(a) See *Shaw* v. *Cash*, 4 Bing. 80. The principal case occurred in *Hilary* Term, but was mislaid.

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## SHELTON *against* LIVIUS.

A printed catalogue of sale contained, among others, this entry:— "Lot 6. Ten acres of spring wheat, on the further hill," with this memorandum at the foot, "the keep of all the fields will be sold with the lots." By the conditions of sale purchasers were to pay a deposit and give security for payment of the remaining purchase money on the next 17th of December. At the sale the auctioneer verbally informed the persons present, among whom were the plaintiff and defendant, that Lot 6 was not spring wheat, and that the keep had been sold by private contract. Plaintiff bought the lot, and the auctioneer inserted his name in the sale book as purchaser. The plaintiff and defendant afterwards desired the auc-

ASSUMPSIT. The first count stated, that on 30 *July* 1831, at &c., a certain crop of corn, to wit, ten acres of wheat, was amongst other things put up

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and exposed to sale by public auction by and on behalf of one *F. Haxledine*, under and subject to the following amongst other conditions of sale, viz. That the highest bidder should be the purchaser, and if any dispute should arise between two or more bidders, the lot in dispute should return to a former bidding and be resold. That credit would be given to the purchaser until the 17th *December* in the said year, on paying a deposit of five per cent. on the amount of his purchase, and giving approved joint security for the payment of the remainder on or before the said 17th of *December*, in the year aforesaid. That the purchaser should be responsible for all casualties or accident which might arise to any portion of the crops from the day of sale. That the amount of acres specified in the catalogue should in every respect be considered as more or less, and no mistake in the description of the lots, whether as to quantity or any other error should vitiate the sale thereof. That the barns and yards should be apportioned off, for the use of the purchasers after the sale, the wheat purchasers to have the first use of the barns, but the purchasers to the greatest extent to have the preference, each purchaser to be allowed proper time for thrashing, &c., according to the quantity bought, and that if any of said conditions were not complied with, the lot or lots should be put up again and resold, and the deficiency arising from each second sale, if any, should be made good by

tioneer to set down the lot to the defendant as buyer, and to send in the account to him. The auctioneer thereupon wrote the defendant's initial, L. opposite to the lot in the sale book, and in the same line with the name of the plaintiff. Defendant asked if he should give security to pay for the crop on the 17th December, according to the conditions of sale. The plaintiff waived taking it, but received the deposit from defendant. The crop was destroyed in a few days after the sale, and the defendant refused to pay the rest of the purchase money:—Held, that as the auctioneer's declarations at the sale would not be evidence to vary the printed particulars, had an action been brought by the original seller against the plaintiff as buyer, so they would not be admissible in an action by him as seller under the original conditions of sale; and the court refused to set aside a nonsuit.

Keep, viz. growing grass of fields, is an interest in land.

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the defaulter; and plaintiff further saith, that at the time and on the occasion of such exposing and putting up to sale of said crop of wheat and other things, the plaintiff became and was the purchaser of the said crop of wheat, at a certain rate or price and under and subject to the conditions aforesaid, and thereupon afterwards, &c., in consideration of the premises, and that plaintiff at the request of defendant had bargained and agreed to sell to defendant said ten acres of wheat upon the terms and conditions aforesaid, and at and for a certain rate or price per acre, to wit, the rate or price of 7*l.* 10*s.* per acre, and under and subject to the performance by defendant of the conditions aforesaid, defendant undertook, &c., to accept and receive said wheat at and after the said rate or price of 7*l.* 10*s.* per acre, and to observe, perform, and fulfil all such of the conditions aforesaid as on the part of the vendee of said wheat ought to be observed, performed, and fulfilled, or kept, and although defendant afterwards, &c., in part performance of the said conditions, paid a deposit of five per cent. on the amount of the said purchase, and although said barns and yards were then and there apportioned off for the use of defendant as the purchaser of said crop of wheat, and although defendant as such wheat purchaser, then and there might have had the first use of said barns, and proper time was allowed for thrashing of said wheat, and paying for the same, hath long since elapsed, to wit, &c., and plaintiff hath always been ready and willing to perform and hath performed all things on his part to be performed in respect of aforesaid contract and premises, to wit, in the county, &c., of all which premises defendant had notice; yet defendant did not nor would, although oftentimes requested by said plaintiff so to do, cut, accept, or receive said wheat, or remove the same from the lands where the same were at the time of said

contract with him, nor hath defendant paid or caused to be paid to plaintiff the remainder of the said price of the said wheat to be by him, defendant, paid as aforesaid, but therein hath failed and made default, and by reason of such the default of defendant, he, plaintiff, hath sustained and incurred divers expenses to the amount of 20*l.* incidental to the said sale by him to defendant, and hath been deprived of certain profits which would otherwise have accrued to him, &c.

Second Count. That plaintiff at the request of defendant had agreed to sell defendant divers, to wit, ten acres of other wheat, then and there growing and being in and upon a certain close, to wit, in &c., at and after a certain rate or price per acre, to wit 7*l.* 10*s.* per acre, and upon certain terms and conditions, that is to say, that defendant should then and there pay to plaintiff a deposit of five per cent. on the price of the said last mentioned wheat, and should pay the residue of the said last mentioned price to the plaintiff on the 17th *December* then next, and should reap, cut down and carry away said last mentioned wheat, within a reasonable time for that purpose then next ensuing, he said defendant undertook, &c., to buy and accept said last mentioned wheat, at and after the rate or price last aforesaid, and to pay a deposit of five per cent. as last aforesaid, and to mow, reap, cut down and carry away said last mentioned wheat within a reasonable time for that purpose then next ensuing, and plaintiff saith, that although defendant afterwards, &c., in part performance of said promise, &c., did pay to plaintiff said deposit of five per cent. upon the price of said last mentioned wheat, and although the said 17th *December* 1831 aforesaid hath long since elapsed, and a reasonable time for the reaping, cutting down and carrying away of said last mentioned wheat hath also long since expired, to wit, in the county aforesaid, of all

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which premises defendant hath notice; yet defendant hath not, although often requested by plaintiff so to do, paid plaintiff the remainder of the price of said last mentioned wheat so agreed to be paid by him as last aforesaid; nor did not nor would reap, cut down, or carry away the same wheat, but therein failed and made default, to wit, in the county aforesaid, whereby plaintiff hath lost, &c. Third count for crops bargained and sold. Plea, general issue.

At the trial before *Vaughan* B. at the *Lent* assizes for *Bedfordshire*, it appeared from the evidence of *Partridge*, an auctioneer, that on the 30th *July* 1831 he put up for sale by auction in lots some standing crops of a Mrs. *Haxledine*. The conditions of sale were read, and there were printed catalogues in the room describing the lots, *inter alia* "Lot 6, ten acres of spring wheat more or less, an excellent crop, on the further hill," with a memorandum at the foot, "that the keep of all the fields until the next old *Michaelmas* day would be sold with the crops, and that the barns and yards were to be appropriated for the use of the purchasers after the sale; the wheat purchasers to have the first use of the barns." The auctioneer, before the sale, had transcribed the printed catalogue into his sale-book, and as he put up each lot he read its description out of that book. The purchaser's name was entered by the auctioneer opposite to each lot as it was knocked down. It being proposed to prove that at the time of the sale the auctioneer announced orally to the persons present, including plaintiff and defendant, that the wheat of Lot 6 was not spring wheat, and that the keep of that field was already sold by private contract, the evidence was rejected, as varying the written contract of sale. After a bidding of 7*l.* 10*s.* per acre by the defendant, Lot 6 was knocked down to the plaintiff at 7*l.* 15*s.* per acre, and his name was entered by the auctioneer in

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the sale-book accordingly. He paid no deposit, but, on being asked by the defendant, declared himself a *bonâ fide* purchaser. *Livius* then said he should like to buy the lot, and had never seen finer wheat of the sort. After the sale was over, the plaintiff and defendant, who had both viewed the wheat, went down stairs, and in a short time returned to the auction-room together. The plaintiff then said, the defendant was to be substituted in his place as buyer, and the defendant desired the auctioneer to make an account out at 7*l.* 10*s.* an acre to him instead of the plaintiff: the auctioneer thereupon inserted the letter L as the initial of the defendant's surname, in the same line, in his sale-book (produced at the trial) in which the entry of the plaintiff's purchase had already been made, after the name of *Shelton*. The defendant then asked whether any security was required (*a*), and on reference to the plaintiff by the auctioneer, he dispensed with it from the defendant. On the next day the defendant paid the plaintiff the deposit, who thereupon gave the defendant the following receipt signed by the auctioneer. "Received of *G. Livius* 3*l.* 15*s.* as deposit on 75*l.*, being the amount of purchase-money at the sale of wheat on 30 *July*." The auctioneer sent the defendant the bill for the whole amount at 7*l.* 10*s.* per acre. The crop was in fact red lammas or winter wheat sown late in spring, which is more liable to mildew than spring wheat; and was destroyed by it a few days after the sale. It was ploughed in at *Michaelmas* for manure. At the expiration of the credit, the auctioneer, in company with the plaintiff, demanded the money of the defendant, who refused to pay. Mrs. *Hazeldine* swore that the plaintiff had paid her for the crop at the rate of 7*l.* 15*s.* per acre before the 17 *December;* but it appeared that there were other accounts between them.

(*a*) Viz. by the conditions of sale, p. 421.

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The plaintiff was nonsuited, with leave to move to enter a verdict for 71*l.* 5*s.*, (the price of the crop at 7*l.* 10*s.* per acre, minus the deposit paid) upon the rejection of evidence. It was also objected for the defendant, that the crops here sold were an interest in land, being to grow and improve upon it, and therefore required a contract in writing under 29 *Car.* 2. c. 3. s. 4.; and that instead of spring wheat winter wheat had been sold.

*Storks* Serjt. for the plaintiff moved according to the leave reserved. The condition of sale, that the misdescription of the crop should not vitiate the contract, applies; for the wheat sold is wheat within the original contract, and was viewed by both parties. The auctioneer's declaration, that the keep of the field had been sold, had the same effect as if it had never been in the catalogue. [Lord *Lyndhurst* C. B. The purchaser of the crop of wheat on the further hill would be entitled to the keep of it till old *Michaelmas* day. *Vaughan* B. The lot proposed to be sold was crop and keep, for the keep must be incorporated in every lot, and the withdrawing it varies the contract for the crop.]

2. This was a distinct contract of sale by plaintiff to defendant, independently of the written description and conditions. The plaintiff paid the owner for the crop, and the defendant paid the deposit for part of it. [Lord *Lyndhurst* C. B. The plaintiff sold all he purchased, therefore he sold the keep of the field.] Defendant's knowledge that the keep was already sold, would in the instance of the sub-sale prevent his buying the same article as had been sold at the first. No interest in land passed under 29 *Car.* 2. c. 3. s. 4.

In *Evans* v. *Roberts* (*a*), Mr. Justice *Bayley* distinguishes a sale of the produce of a certain quantity of

(*a*) 5 B. & Cr. 832.

land planted with potatoes, from *Crosby* v. *Wadsworth* (*a*), where a contract for growing grass, the natural and permanent produce of the land, renewed from time to time without cultivation, was held to be an interest in land.

[*Bayley* B. The purchaser of the keep would have a right to turn in cattle, and would only be entitled to the growing grass. As the keep would go to the heir, and could not be taken in execution, that is an interest in land. Then if the defendant bought all which the plaintiff had bought, he must be considered as having bought the keep of the field as well as the crops, which are goods and chattels.]

The court granted a rule, Lord *Lyndhurst* C. B. adding that there might possibly be a distinction between the case of the plaintiff as buyer, from Mrs. *Haseldine* the original seller, and that of the plaintiff as the second seller to the defendant.

*B. Andrews* and *Gunning* showed cause. This being a sale of an interest in land, no parol evidence could be admitted to vary the printed particulars. The defendant bought from the plaintiff what he had bought at the auction, but could not tell what that was, except by the particulars of sale. All the cases show that neither the original nor second seller could vary the printed particulars by the auctioneer's declarations at the time of sale, and that the rule is inflexible. *Gunnis* v. *Erhart* (*b*), *Powell* v. *Edmunds* (*c*), *Jenkinson* v. *Pepys* (*d*), *Jones* v. *Edney* (*e*), *Higginson* v. *Clowes* (*f*),

(*a*) 6 East, 602. (*b*) 1 H. Bla. 289. (*c*) 12 East, 6.

(*d*) Cited 12 East, 10; 6 Ves. 330; 9 Ves. 330; 15 Ves. 521; and 1 Ves. & B. 167, 378, 524.

(*e*) 3 Camp. 285, 506. And see 2 Bla. R. 1249; 3 Wils. 275; 5 Rep. 26; and the cases collected in Phillipps on Ev. 6th ed. 540, &c.

(*f*) 15 Ves. 516.

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It is said that the sale to the defendant was independent and absolute, and might be proved on the count for goods bargained and sold; but did it entitle the plaintiff to the purchase-money immediately, or before the credit expired under the conditions of the auction? If it had been a distinct transaction the L would not have been inserted in the sale-book. In fact no demand of the price was made till the credit expired, the contract having been to put the defendant in the place of the plaintiff, who had bought at the auction. As there is no evidence that the plaintiff communicated to the defendant that he had not bought exactly what was described in the particulars, all the above cases apply, for they go on the principle of not varying a written contract, and do not depend on the mere fact of a sale by auction; *Townshend* v. *Stangroom* (*a*).

On the question whether a contract to buy growing crops draws to it as part of the contract any interest in the land, or a mere right to be on it to take them away, this case differs from *Evans* v. *Roberts* (*b*), where the sale of the produce of a cover of potatoes was held not to convey an interest in the land. The purchaser there had no exclusive right to the land for a time in order to make profit of the growing surface, and the seller was to raise the potatoes. But as the buyer of a growing crop of corn would acquire a right to let it continue on the land till maturity (*c*), so he would also require a right to enter the land, in order as well to weed and hoe the crop as to cut and harvest it; whereas, if he should be held to have only bought the growing crop itself, he could not enter the land for the former purposes. In *Evans* v. *Roberts*, the seller being to raise the potatoes, the buyer was held to have only an easement in order to take them away; whereas in the pre-

(*a*) 6 Ves. jun. 332, &c. (*b*) 5 B. & C. 836.

(*c*) See *per Bayley*, J. *Evans* v. *Roberts*, 5 B. & Cr. 836.

vious case of *Emerson* v. *Heelis* (*a*) the buyer of growing turnips was to raise them, and was held to have an interest in the land.

[*Bayley* B. In *Smith* v. *Surman* (*b*) the seller cut the timber (*c*). The accredited ground of the decision in *Evans* v. *Roberts* was, that growing potatoes being emblements were deemed chattels, as being raised by labour and manurance, and therefore belonging to the executor, not to the heir (*d*).]

Again, the extent of the land was not the measure of the contract in *Evans* v. *Roberts*. The previous cases of *Waddington* v. *Bristow* (*e*), *Crosby* v. *Wadsworth* (*f*), and *Emerson* v. *Heelis*, had recognized a right to have the subject-matter of sale continue in or on the land, as an interest in land. Nor was the exact time for removal of the potatoes here stipulated for, so that while they remained in the land the purchaser had an interest in it. The cases which hold that a sale of growing crops does not convey an interest in land, either turn on their being ripe, and therefore chattels, or on the raising them being to be done by vendor and not vendee.

2dly, The contract between plaintiff and defendant is for spring wheat, as originally stated in the particu-

(*a*) 2 Taunt. 38. (*b*) 9 B. & C. 561.

(*c*) In *Teal* v. *Auty*, 2 Br. & B. 99, the buyer of the growing poles cut them. In *Parker* v. *Staniland*, 11 East, 362, and *Warwick* v. *Bruce*, 2 M. & S. 205, the buyers were to raise the potatoes. The fact seems immaterial to the question, Whether the contract was for an interest in land? See per Mr. Justice *Holroyd*, 5 B. & C. 888, cited *post*; and in *Smith* v. *Surman*, *Emerson* v. *Heelis*, and the principal case, it seems not to have been necessary to decide the question on the 4th section; for the contracts having been signed by the parties or their agent, were equally binding on a sale of goods or land. See per *Bayley* J. 5 B. & C. 833; and Wentw. Off. Ex. 62; Gilb. Ev. 249; Harg. Co. Lit. 55 b.; 2 Bla. C. 123.

(*d*) See S. P. per *Abbott* C. J. E. T. 1827, MS.

(*e*) 2 B. & P. 452.. Hops. (*f*) 6 East, 602. Grass for hay.

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lars; and the variance in quality between spring and winter wheat was held a breach of warranty; *Batley* v. *Faulkner* (*a*).

*Storks* Serjt. and *Kelly* contrà, for the plaintiff. No question of law can arise except on *29 Car.* 2. c. 3. s. 4. Here a contract for sale having been made between Mrs. *Haxeldine* and the plaintiff, a second and distinct contract is made for the sale by the plaintiff to the defendant of something, to which, if it be held to be an interest in land, as contended on the other side, sect. 4 must apply. But *Evans* v. *Roberts* shows that no interest in land passed. The beneficial effect of that case was to draw for the future a broad line of distinction on the construction of sect. 4. The potatoes there sold were growing at the time of the sale. The digging them up by the seller made no difference; for, *per Holroyd* J., if the buyer had been to dig them it would have been a mere easement (*b*). Then is this case within *Evans* v. *Roberts*, *Emerson* v. *Heelis*, or *Crosby* v. *Wadsworth?* The strong distinction of the latter case is said by *Bayley* J. to be, that the buyer acquired an interest in the land by the necessity that he should have possession in order to mow for hay; and growing grass is the natural and permanent produce of the land, renewed from time to time without cultivation. So as to purchase of keep to be ate by cattle, exclusive possession is necessary. What distinction is there between a growing crop of potatoes and of corn? both being chattels seizable under a *fi. fa.* (*c*). If wheat requires weeding and hoeing, so might potatoes and all produce for man's use. Nor could a general rule be laid down for crops in general.

(*a*) 3 B. & Ald. 288; and see *Bridge* v. *Wain*, 1 Stark. C. N. P. 504.
(*b*) 5 B. & C. 838. (*c*) Tidd, 1039. 56 G. 3. c. 50.

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Next, was this a sub-contract between the plaintiff and defendant? On the words of the auctioneer, when desired to substitute the defendant's name for the plaintiff's, and to fix a different price, it would be for the jury to say, on the count for goods bargained and sold, who was the vendor, as showing the terms of a contract between those parties, for the auctioneer's authority is determined by the sale. Unless Mrs. *Haxeldine* was present and consenting, the entry in the book could not rescind the plaintiff's former contract, already completed with her at the auction. She might have insisted on plaintiff's performing the contract, notwithstanding the subsequent contract by the defendant with him. Then the defendant could not be substituted for the plaintiff by the act of the auctioneer. [*Bayley* B. The directions of the parties at the time might show their intentions.] The defendant and plaintiff deal in private, and the deposit is paid to the plaintiff, not to the auctioneer. Many cases show that parol evidence could not be adduced to vary the written description of the corn. Here it is not the question whether, if Mrs. *Hazeldine* had sued the present plaintiff, she might have set up any declarations to vary that contract; but here she has sold to the plaintiff, who having undersold to another person, the auctioneer's previous declaration of the quality of the wheat may be admitted in evidence between the plaintiff and defendant, though not between the plaintiff and Mrs. *Hazeldine*.

It is urged that this is not spring wheat; but the contract between Mrs. *Hazeldine* and the plaintiff was confounded at the trial with that between the plaintiff and defendant, and the evidence inapplicable to the former when tendered on the special counts only was then totally rejected, before the count for goods bargained

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and sold was considered. In an action by Mrs. *Haseldine* against the plaintiff on the sale by auction the contracts would have been the only evidence, but that consequence does not follow: for this is an action on a contract between the plaintiff and defendant. Evidence then might be offered by the plaintiff that the defendant had received information that this was not spring wheat. [*Bayley* B. The plaintiff gave no evidence that he said it was not spring wheat, or that he guarded against rescinding the contract on that account. If it had been in evidence that after the plaintiff had bought, he had said to the defendant at the time, I have bought the crop and the crop only, I am not to have the keep, and I hear it is not spring but lammas wheat, I should have been of opinion that the defendant must have taken it, and could not have rejected it for not being spring wheat or for want of the keep. *Vaughan* B.—The conditions of sale required security to be given; and after this so called sub-contract was made, the plaintiff was referred to to know whether security should be given by the defendant, who offered to give it according to the conditions of sale.]

*Cur. adv. vult.*

BAYLEY B.—This case stood over for our consideration of a distinction taken in support of the rule between the contract of the plaintiff as original purchaser, and of the defendant as purchaser from the plaintiff, viz. that the bargain made by *Shelton*, as buyer from Mrs. *Haseldine*, and to which he, if sued by her, might have raised objections, differed from that made by him as seller to *Livius*, and that though the evidence offered by the plaintiff was rightly rejected as to the special counts, it ought to have been received on the count for

crops bargained and sold. We have considered the point, and have conferred with Mr. Baron *Gurney* upon it. If the justice of the case required that a second trial should have taken place, or if there was any probability that the party who has failed would succeed on that point on another trial, then, though the point was first suggested on the argument here, and was not taken by counsel at the trial, or presented to the jury by the learned judge, we should have made the rule absolute for a new trial. But if it appears to the court that the justice of the case does not require a second trial, and that there is no reasonable prospect of a different result if it took place, the rule must be discharged. In this case we are satisfied that no such reasonable prospect exists, and that that which was a valid objection to the contract of *Shelton* as a buyer, would apply in like manner to his contract as a seller. This was an action for the price of crops growing on the ground of Mrs. *Hazeldine*. There were two counts on the special contract, and a third for crops bargained and sold. (The learned judge here shortly stated the special counts.) It appeared in evidence at the trial, that the sale took place in July last, and that the plaintiff and defendant remained there all the time it continued, and that the auctioneer was selling the lot in question by a certain printed paper on which it was thus described: " Lot 6. Ten acres of spring wheat, more or less, an excellent crop, on the further hill." There was also this memorandum at the foot of the paper: " The keep of all the fields until Old Michaelmas-day next will be sold with the crops." At the trial the plaintiff endeavoured to prove a valid sale by Mrs. *Hazeldine* to the plaintiff, and parol evidence for that purpose was offered to show that though this lot was described in the printed particular as spring wheat, that description was corrected by the auc-

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tioneer's explanation at the time of sale, that the wheat of Lot 6 was not spring wheat, and that the keep of that field was not to be sold with the crop. It was contended that the purchaser, *Shelton*, could not on that account object that he was not to have the keep of that field, or that the wheat in it was other than spring wheat. It was properly objected for the defendant that this evidence was inadmissible to vary the written agreement existing between the parties by showing that more or less should be sold than contained in the written agreement; for that whether this was a sale of land under 29 C. 2. c. 3. s. 4., or of goods and chattels under s. 17 (which latter I take to be its proper description (*a*) ), a memorandum in writing, signed by the party to be charged, or his agent the auctioneer, was equally necessary to bind the contract between the parties; and taking the bargain to be for goods, no part payment or other alternative specified in s. 17 had taken place to bind the parties, so that the signature to the written contract was essential. After the explanation by the auctioneer, Lot 6 was sold to the plaintiff, and his name was put down by the auctioneer as the purchaser of that lot at 7*l.* 15*s.* per acre. Many cases have decided that such signature by the auctioneer at a sale, whether of land or goods, is binding on the parties, he being a lawfully authorized agent for both buyer and seller. Then the written document must be looked to to show what is the written agreement between the parties; and on so doing it appears to be an agreement to sell and to buy ten acres of spring wheat with the keep of the field. Many authorities show that the parol evidence was properly rejected, *Gunnis* v. *Erhart* (*b*), *Powell* v. *Edmunds* (*c*), and the

(*a*) See *Mayfield* v. *Wadsley*, 3 B. & C. 357; and per *Hullock* B. *Sewell* v. *Boxall*, 1 Y. & J. 398; *Evans* v. *Roberts*, 5 B. & C. 829.

(*b*) 1 H. Bla. 289. (*c*) 2 East, 6.

other cases collected in 1st *Phillipps* on Evidence, ch. x. s. 2. (*a*). The short principle on which this evidence could not be received against the defendant is, that the written instrument signed by the auctioneer was the only thing into which you were at liberty to look to discover what the contract between the parties was at the time of making it, viz. at the sale; and the object of shutting out parol evidence in such a case is to prevent the frauds which would otherwise arise from parties declaring that they bought or sold something more or less than or different from written particulars. Therefore, as that instrument specifies ten acres of spring wheat and the keep of the field, the plaintiff was not at liberty to give parol evidence that the buyer was not entitled to have that sort of wheat or the keep. The general rule that an auctioneer shall not be permitted, by oral explanation at the time of sale, to vary from the terms of the printed (*b*) particulars is useful, and attended with no hardship, for it would have been easy in this, as in all other cases, for the auctioneer to have made the condition or description in the particulars conformable to his oral declaration, by striking out the words "spring" from the description of the lot, and "keep of all the fields" from the memorandum at the foot. The buyer of the lot would then have been bound to take the lot by the auctioneer's signature to the written contract, in which it was so expressly described (*c*). But it has been argued that there is a distinction between the cases of the plaintiff *Shelton* as buyer from Mrs. *Haxeldine*, and of the defendant *Livius* as buyer from *Shelton;* for that though the plaintiff might be only bound by the written contract as having bought *at* the sale, *Livius* was not so bound,

(*a*) P. 541, 6th edit.

(*b*) See *Schneider and Another* v. *Norris*, 2 M. & S. 286.

(*c*) 2 Taunt. 38; 4 Taunt. 209.

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he having purchased *after* it. It was argued that it appeared on the evidence that *Livius* might therefore have agreed with the plaintiff after the sale to take to the bargain as it was, and might have consented to waive all objections to the misdescription of the quality of the corn and to the omission of the keep, so that nothing would prevent the plaintiff's enforcing such a sub-contract with the defendant. And it was contended that in that view evidence might be given of the expressions of the auctioneer relating to this lot, on the count for goods bargained and sold. But I am of opinion that no such distinction can be made in this respect, for the facts show that what was the objection when the plaintiff was the buyer, distinctly applied in the same manner when the defendant was the buyer. What passed between them when they left the sale room does not clearly appear, but it is distinctly proved that after the sale both went away, that both afterwards returned, and that the defendant then desired the auctioneer to make out the account for Lot 6, at 7*l.* 10*s.* per acre, to him, instead of the plaintiff. Up to that point nothing occurred to bind the bargain by writing as against *Livius*, but the auctioneer being the accredited agent of both parties, and being desired by the defendant to substitute his name for that of the plaintiff in the contract, placed the letter L opposite this lot in the sale book to show that *Livius* was to be the purchaser of what had been sold to *Shelton*. We are then to look at this instrument to see what Mrs. *Hazeldine* contracted to sell and the plaintiff contracted to buy. On doing so, I am of opinion that the parol evidence could no more be received against the defendant as purchasing from the plaintiff than it could have been against the plaintiff as the original buyer, because in either case it would be equally at variance

with that signed by the lawfully authorized agent of both parties.

VAUGHAN B.—The same consequences would, in all probability, result if this cause should be sent to a second trial, and I therefore concur in discharging the rule, not only for the grounds stated by my brother *Bayley*, but upon the view which was taken of the case at the trial. Both parties were present at the sale; the auctioneer is the agent of the seller Mrs. *Hazeldine*; the lot is sold to the plaintiff; after it is knocked down he and the defendant retire down stairs, and on their return together the defendant desires to have his name substituted in lieu of the plaintiff's as a purchaser of Lot 6. The auctioneer accordingly makes that substitution by introducing the letter L in the sale book; no money is paid or security given by the plaintiff for the amount of the purchase money. It is asked, whether security should be given to the auctioneer, and he declines taking it from the defendant. Then is not this introducing the defendant to relieve the plaintiff from all further liability as original purchaser (*a*)? But it is contended that the auctioneer had no authority to discharge the plaintiff from liability to Mrs. *Hazeldine* by transferring his bargain to the defendant, or to do more than sell by auction; but leaving out of the question the original authority of the auctioneer as derived from the seller, there was very strong evidence of her having afterwards ratified his act in making that additional arrangement; for the bill for the wheat was made out by her agent the auctioneer to the defendant, and when the credit is out on the 17th December, he pays the money to her. This then sets up and ratifies the contract between the original seller and the defendant,

(*a*) See *Price* v. *Seaman* (in error), 4 B. & C. 525; S. C. 2 Bing. 457.

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and absolves *Shelton* from his liability to the former. It might also be asked, What has become of the balance between 7*l.* 10*s.*, the price which the defendant agreed to buy, and the 7*l.* 15*s.* which the plaintiff was to give for the lot. Taking this, however, as an original contract, I think parol evidence was not admissible to vary it, and the same rule applies to it as a sub-contract upon the insertion of the letter L by the seller's agent.

BOLLAND B.—I concur that this rule ought to be discharged, and my opinion is founded on the evidence given at the trial. The question was, What did the defendant buy? and was he bound to take Lot 6?—The only evidence as to the agreement between the parties was that of the auctioneer, relating to the transfer of the bargain by writing *L* on the line in which the sale to *Shelton* had been entered in the sale book. Then as what was heard by the defendant during the auction in contradiction of the printed particulars would not have been admissible between the plaintiff and Mrs. *Haseldine*, it was not receivable against the present defendant.

Rule discharged.

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## KENDRICK *against* LOMAX.

Expenses of noting and postage incurred on the return of an inland bill of exchange are not recoverable by the holder unless specially laid as damages and proved accordingly. Qu. If a charge for noting is in any case recoverable on an inland bill not protested. Where on a bill becoming due the holder agrees to receive another bill in renewal of it, his remedy on the first is suspended till the second is dishonoured, as well for expenses incurred by non-payment of the first as for its amount.

ASSUMPSIT by the indorsee against the acceptor of a bill of exchange for 35*l.*, drawn at 75 days after date by *Wellings*, payable to his own order, in-

dorsed by him to *Blundell*, and by him to the plaintiff, with the money counts and usual conclusion to the damage of the plaintiff. Pleas—1st non-assumpsit, and several others.

Fourth plea (to third count) stated that before the exhibiting of the plaintiff's bill, to wit, on 5th *January* 1832, he, the said defendant, was lawfully possessed, as of his own property, of a certain other bill of exchange, drawn by *H. Wellings* upon and accepted by the defendant, whereby the said *H. Wellings* requested said defendant to pay to his, the said *H. Wellings'* order [in *London* (*a*)], the sum of 35*l.* at two months after the date thereof (which period is not elapsed), which said last mentioned bill of exchange was then and there duly indorsed by the said *H. Wellings* [in blank], and also by the said *W. Blundell* [in blank], and the deponent further says, that afterwards, and before the exhibiting of the bill &c., it was agreed between and by the plaintiff and the defendant, and the said *H. Wellings* and *W. Blundell*, that the said last mentioned bill of exchange should be delivered to the plaintiff *for and on account and in renewal* of the said bill of exchange, in the said third count specified, and that the said plaintiff should then and there accept and receive the said bill of exchange in this plea specified, for and on account and in renewal of the said bill of exchange in the said third count specified, and that in consideration thereof he, the said plaintiff, should *not sue upon* (*b*) the said bill of exchange, in the said third count specified, until after the dishonour of the said bill of exchange in this plea specified. And the defendant avers, that in pursuance of such

(*a*) The words between brackets were omitted in the other pleas.

(*b*) In another plea the word *return* was substituted for these words.

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agreement he, the said defendant, did then and there, before the exhibiting of the bill of the plaintiff in this behalf, deliver to the plaintiff the said bill of exchange in this plea specified, for and on account and in renewal of the said bill of exchange in the said third count specified, and the said plaintiff then and there, to wit, before the exhibiting &c., accepted and received the said bill of exchange in this plea specified, for and on account and in renewal of the said bill of exchange in the said third count specified, and by reason of these premises he the said plaintiff suspended his right of action against the defendant in the said bill of exchange, in the said third count specified, until after the said bill of exchange in this plea specified should be dishonoured; and the defendant avers, that the said last mentioned bill of exchange has not yet become due and payable, according to the tenor and effect thereof, and has not been dishonoured. Verification.

Another plea (to the fifth count) stated that before the exhibiting of the bill &c., to wit, on the 5th of *January* 1832, the said defendant being lawfully possessed as of his own property of a certain other bill of exchange, drawn by the said *H. Wellings* upon and accepted by the defendant, whereby he the said *H. Wellings* requested the defendant to pay to his (the said *H. Wellings*) order the sum of 35*l.* two months after the date thereof, which period was not elapsed, and which said last mentioned bill of exchange was then and there duly indorsed by the said *H. Wellings*, and also by the said *William Blundell*, he the said defendant, by the consent of the said *H. Wellings* and *W. Blundell*, after the making of the said promise in the said fifth count mentioned, and before the exhibiting of the bill, &c. delivered to the said plaintiff the said last mentioned bill of exchange in full satisfaction and discharge of the said promise in, &c.

and of the sum of money in that count also mentioned, and of all damages sustained by the said plaintiff by reason of non-payment thereof, and which said last mentioned bill of exchange he the said plaintiff then and there accepted and received of and from the said defendant, in full satisfaction and discharge of the said promise in the said fifth count mentioned, and of the said sum of money in that count also mentioned, that of all damages sustained by plaintiff by reason of the non-payment thereof. Verification.

Issues thereon, that plaintiff did not accept and receive the said bill of exchange in the said fourth plea specified for and on account of and in renewal of the said bill of exchange in the said third count specified, and that said plaintiff did not accept and receive of and from the said defendant the said bill of exchange in the said fifth plea mentioned, in full satisfaction and discharge of the said promise in the said fourth count mentioned, and of the said sum of money in that count also mentioned, and of all damages sustained by the said plaintiff by reason of the non-payment thereof.

At the trial before *Bayley* B. at the *Lent* assizes for *Leicestershire* the following appeared to be the facts: The bill sued on became due on *Saturday* the 7th of *January*. The last indorser, *Blundell*, proved that on the 6th, the day before it became due, *Wellings* asked him to whom he had paid it over, saying it would not be paid. *Wellings* then gave *Blundell* another bill for 35*l*. also drawn by himself and dated the 5th, telling him to take it to the holder of the first bill, and get him to renew the one with the other. *Blundell* did not see the plaintiff on the subject till about mid-day on *Tuesday* the 10th, at *Birmingham*, by which time he would have received the first bill from *London*, returned in due course for non-payment. At first the plaintiff refused to renew the bill as proposed, but on *Blundell*'s telling

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him when the first bill came back to take it to *Wellings*, who would pay the expenses on it, assented and took the second bill. The plaintiff said he had not the first bill with him then, and it remained in his possession; nor did it appear that he had ever demanded or received interest or expenses on it. A witness said that the ordinary expenses, *e. g.* of noting and postage on returning a bill from *London* to *Birmingham* would be about four shillings. The learned baron told the jury that a smaller sum could not be taken in satisfaction of a larger debt due, and put it to them whether the second bill was taken by the plaintiff for and on account of and in renewal of the first. The jury found in the affirmative, but gave a verdict for the plaintiff for four shillings, the expenses of the returned bill. The learned baron inclined to the opinion that such expenses were recoverable without alleging special damage in the declaration, but gave leave to move to enter a verdict for the defendant, to take the opinion of the court on that point, with reference to the form of the declaration.

*Adams* Serjt. moved accordingly. The declaration contains no averment of expenses incurred by way of special damage from non-payment of the bill, so as to warrant the finding; nor was there evidence that actual expense had been incurred on the return of the bill. Noting and postage are not expenses necessarily accruing on that event, and the former is not allowed on taxation by the master, except on foreign bills. [*Bayley* B. Postage can always be recovered: the amount of the bill and expenses are always recovered as damages sustained by non-payment of the bill.] He also contended that the jury had in effect found, that by taking the second bill in renewal of the first the plaintiff had suspended his right to sue on the first, and that

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therefore his right to sue for expenses which were part of the damages accruing from the non-payment of the first bill, was also suspended during the currency of the second bill.

The court granted a rule, against which

*F. Pollock, Goulburn* Serjt. and *Amos*, now showed cause. Interest is recoverable on an inland bill as damages without the loss of it being specially alleged as damage in any count. [*Bayley* B. There a plaintiff recovers interest with the principal due on the bill as damages for breach of the contract on the bill (*a*).]—The first bill not being given up, and its payment having been postponed, interest must have accrued on it. Then why should not any other loss sustained by the holder on account of that bill, *e. g.* noting, postage, &c. be awarded by the jury as damages along with its amount? Noting is allowed on taxation in actions on foreign bills as one of the "charges" thereon, though not specially named in the declaration as re-exchange is (*b*). The defence is, not that a second bill has been given as well for the expenses of non-payment of the first, as for its amount, but that a second bill has been given pro tanto only, viz. for the amount of that bill. Then that is a plea of payment of a smaller sum as for a greater sum due, viz. accord without satisfaction and bad; *Fitch* v. *Sutton* (*c*). There seems to be no reason that the time of suing for the interest and expenses incurred by the return of the first bill shall be put off till after the second becomes due. [*Bayley* B. Are not the expenses of re-exchange, &c. always alleged in a declaration on a foreign bill? Noting is only making a minute on which to draw out the protest at length.] It would

(*a*) See cases collected, Chitty on Bills, 5th ed. 537.
(*b*) See 2 Ch. on Pl. 4th ed. 173, 178.
(*c*) 5 East, 230.

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be nothing unless followed up by protest; and though the practice of noting inland bills grew up under statute 3 & 4 *Ann.* c. 9. s. 4. it is useless, since it was held in *Windle* v. *Andrews* (*a*), that interest is recoverable by indorsee against drawer of an inland bill without protest. [*Bayley* B. Can the right to recover costs and damages take place or become vested without recovering on the bill to which that right is accessary? If the plaintiff cannot recover on the bill as such, what count contains a statement of the expenses of protest? It is clear on the evidence that when you sued on this bill, the other was outstanding.] Noting &c., is a damage incurred in consequence of the defendant's default to pay the bill, though, like interest, not mentioned in it. The expenses of protest of a foreign bill would be allowed as a demand arising from such default, and not out of the bill itself; and setting aside the noting, as neither interest nor postage were recovered, the verdict ought to stand for those expenses.

*Adams* Serjt. and *M. D. Hill* contrà. It was not shown that expenses accrued by the return of this bill, or that the plaintiff had paid the four shillings given by the jury. The plaintiff, admitting that he cannot recover on the first bill, alleges that he is entitled to recover the expenses; in practice they are never recovered on inland bills, it being inexpedient to call witnesses to prove so small an amount. Nor can they be recovered under the general allegation of damage, as damages necessarily resulting from non-payment of the bill, but being demands merely contingent, and not necessarily incident to that default, should have been alleged, if they occurred, by way of special damage. Again, if

(*a*) 2 B. & Ald. 696.

these expenses when incurred are contingent, and accessary to the non-payment of the bill, how can a plaintiff recover for those consequences of non-payment, when at the time of bringing this action his right to recover for the non-payment itself was suspended? *Dixon* v. *Parkes et al.* (*a*) shows that interest cannot be recovered on a bond after the obligee has received the principal without it.

BAYLEY B. (*b*).—I am of opinion that the rule for a new trial must be made absolute. The bill sued on became due about the 7th of *January*. Another bill, dated the 5th of that month, was handed over to the holder in lieu of the first bill, and before that second bill became due the present action was brought. That being a negotiable bill, the plaintiff is virtually precluded from suing on the first bill, unless he has satisfied the defendant that he has no claim against him on the second, as *e. g.* by delivering it up to him before suing on the first. Then during the intermediate time of the running of the first bill, can the plaintiff sue for the expenses of noting, and for expenses and interest due on it? Without deciding that, it is sufficient to say, that there are here particular circumstances to show that the plaintiff is not entitled to recover. Thus the amount of the charges would not be known to the defendant, and he would have great difficulty in ascertaining them, till the first bill was returned to him by the plaintiff. To obviate that difficulty, the plaintiff was directed to take the bill when it came back to *Wellings*, who would pay any expenses incurred on it. I think that the plaintiff should either have asked

(*a*) 1 Esp. 110.

(*b*) Lord *Lyndhurst* was sitting in equity.

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*Wellings* to pay him those expenses, or, in case of refusal, should at once have returned the second bill, and sued the defendant on the first. He might then have recovered such charges as he should prove himself to have incurred, and therefore would be fairly entitled to recover. Here, by taking the second bill he virtually agrees to postpone his right to sue not only on the first bill, but for charges and expenses accessary to its non-payment before the time for payment of the second has arrived. I know no instance of an action for expenses of the return of a bill, except as accessary to the original bill; and unless the plaintiff has delivered up the second bill, I am of opinion that he is not entitled to sue on the first.

The practice at nisi prius in *London* and *Middlesex* has been, not to allow the expenses of noting, unless it is made the subject of a special averment of damage. Mr. *Chitty*'s work on pleading was quoted in argument, and puts the necessity for such an averment on a fair and reasonable footing. Such damages as may be presumed *necessarily* to result from the breach of contract need not be stated in the declaration, but in other cases it is necessary to state the damage arising from the breach of contract specially and circumstantially, in order to apprise the defendant of the facts intended to be proved, or the plaintiff will not be permitted to give evidence of such damage on the trial (*a*). Here the damages arising from the non-payment of the bill not being specially stated, I think the plaintiff is not entitled to recover them. It is consistent with this declaration, that the expenses of noting have not been incurred, though the bill has been returned; nor are they incurred of necessity, for the bill might be returned by the holder himself without any having arisen; where

(*a*) 1 Chitty on Pleading, 296, 4th edition.

they have been incurred, they ought to be specially claimed in the declaration.

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VAUGHAN B.—The expenses of noting and postage are accretions to the principal amount due, and there is no direct proof that they were either incurred or actually paid.

BOLLAND B.—I am of opinion that in this particular case the costs of noting and postage, if paid by the plaintiff, could not be recovered without a count specially claiming them as damages. The distinction between this claim and that for interest is, that the former does not arise out of the instrument itself, whereas, if a bill is not paid at the day, the holder's right to charge interest arises out of the contract.

Rule absolute.

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## BRIGGINS *against* GOODE and Others.

Where a distress is sold without the previous appraisement directed by 2 W. & M. sess. 1. c. 5. s. 2. the party distrained on can only recover the value of the goods, *minus* the amount of rent due; but may recover the special damage sustained by such illegal sale.

CASE for an excessive distress, with a count for taking and carrying away and selling goods as a distress for rent, without first causing them to be duly appraised, in pursuance of *2* W. & M. sess. 1. c. *5.* s. *2.* At the trial before *Gurney* B. at the *Guildhall* sittings in this term, it appeared that the plaintiff's goods were worth 40*l.*, and were taken by distress for that sum in arrear to the defendant for rent. The defendant had prevented the constable from swearing two appraisers according to the act, and the goods sold for 10*l.* only. The jury found a verdict for the plaintiff for 50*l.* damages, subject to be increased on motion to 90*l.*, by adding 40*l.*, the value of the goods taken, if the court should be of opinion that the plaintiff was entitled to recover the additional damages given on that account.

*Bompas* Serjt. moved accordingly. The plaintiff

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is entitled to recover the whole value of the goods taken and sold; for the appraisement prescribed by 2 W. & M. is a condition precedent, for default of performing which the sale which took place became illegal. Then has 11 G. 2. c. 19. s. 19. taken away from the plaintiff his right to recover the value of the goods so illegally sold? That enactment appears from the preamble to have been intended to prevent the plaintiff from recovering the amount of the rent in arrear, as for a trespass *ab initio*, where any irregularity took place in making a lawful distress; but it does not affect the right to recover special damages for an illegal act committed after a previous irregularity in the distress had exhausted the operation of the act. Now the omission to appraise was an unlawful act or irregularity in making the distress, which would have rendered it illegal *ab initio*, had not 11 G. 2. been in operation; then as no power to sell exists without appraisement, the sale without it became a substantive and an illegal act, distinct from the distress itself. It deprived the plaintiff of his power to replevy and revested in him his common law right to sue for the value of the goods taken. On this principle damages have been recovered for a trespass in wrongfully continuing in possession of distrained goods on the premises after the time allotted by law, *Winterbourne* v. *Morgan* (*a*). The clause of 2 W. & M. which was intended to give protection against frauds in selling at an under price, will become useless if damages may not include the value of the goods improperly sold, or if the rent in arrear may be set off against that value when given as damages by a jury. He also cited *Owen* v. *Legh* and *another* (*b*).

Lord LYNDHURST C. B.—The statute 2 W. & M. cannot be said to be nugatory, if damages are recovera-

(*a*) 11 East, 395. (*b*) 3 B. & Ald. 471.

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ble for its infringement. Then if a distress, otherwise illegal *ab initio* for some irregularity in its execution, is rendered valid by the act 11 G. 2. c. 19. s. 19. it follows, that the interest of the person distrained on in the goods, is the amount of the difference between the rent and the special damage sustained by the irregularity. Now independently of the authority of Mr. Justice *J. Parke*, in a case with which we have been furnished (*b*), the statute 11 G. 2. c. 19. s. 19. does not

(*a*) *Notts* v. *Curtis*, tried before *J. Parke* J. at the spring assizes for *Nottinghamshire* 1832. Case for taking an excessive distress, with counts for distraining for more rent than was due, for selling under the best price that could be obtained, for selling without having had the goods duly appraised, and in trover. The defendant had distrained for 3*l*. more than was really due; he had sold by auction goods worth 15*l*. for 6*l*., which was the best price that could be obtained for them under the circumstances, and the sale took place without any previous appraisement.

It was contended on the part of the plaintiff, that besides the 3*l*., the amount of the excess of the sum distrained for over that really due, he was entitled to recover damages for the difference between the full value of the goods (15*l*.), and the rent in arrear (about 3*l*.) At common law, the goods distrained could only have been kept as a pledge until the tenant released them by payment of the arrears. The statute 2 W. & M. gave the landlord power to sell them upon certain conditions, one of which was that he should first have them duly appraised by two sworn brokers. The defendant not having complied with this condition, could not avail himself of the power given him by the statute, and was, therefore, restricted to his rights at common law. So that if the plaintiff had them back again they would be worth 15*l*. to him; and deducting from this sum the 3*l*. arrears, he was entitled to a verdict for the balance, viz. 12*l*.

For the defendant it was argued that the distress was legal in its inception, and that, therefore, by 11 G. 2. c. 19. s. 19. the plaintiff could only recover special damage for the irregularity in question, namely, for selling without appraisement. Here no special damage was alleged in the declaration, nor was any proved to have been sustained. The goods had been sold for the best price that could be had; then the plaintiff lost nothing by their not having been previously appraised. On the contrary, he had been saved that expense.

To this it was replied, that although the *distress* was legal in its inception, the defendant had no right to *sell*. The illegal sale, therefore, was not

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invalidate the distress itself, for an irregularity committed in the course of it. These goods then were held under the distress, as subject to the landlord's claim for rent, but were afterwards sold without the appraisement required by the statute of W. & M. Then if the tenant has sustained injury by the defendant's neglect of the requisites of that act, he is entitled to damages, *minus* the amount of the rent due, and will here recover them as for the special damage occasioned by the irregularity committed.

BAYLEY B.—The question turns on 11 G. 2. c. 19. s. 19. and is, What special damage has been sustained for want of the appraisement required by 2 W. & M. Here the defendant had a right to sell, though he did not adopt the legal preliminaries. Now when the goods distrained were in the landlord's hands, the tenant's interest in them was *minus* the rent, for he could never regain possession of them, unless he paid

a mere irregularity, but a substantive trespass. By that sale the plaintiff had been deprived of the opportunity of redeeming the goods, which by law he was entitled to do, as the conditions of 2 W. & M. had not been complied with. Had it not been for that illegal sale, he might now have in his possession goods of the value of 15*l*., for which he might only have paid 3*l*., consequently he was fairly and legally entitled to a verdict for the difference between these two sums.

Mr. Justice *J. Parke* was of opinion that the omission to have the goods appraised was not a mere irregularity within the meaning of the 11 G. 2. but that constituting as it did, a breach of one of the conditions precedent upon which the defendant was empowered to sell what before the passing of the act of W. & M. he could only have detained as a pledge until the rent was paid, it rendered the sale altogether illegal, and that consequently the plaintiff had a right to be put in the same situation as if no sale had taken place. He therefore was entitled to have his goods back upon payment of 3*l*. the arrear of rent; or, as that could not now be done, to receive the full value of them, deducting that amount. Verdict for the plaintiff, damages 12*l*. *Miller* for the plaintiff, *Adams* Serjeant and *Clinton* for defendant.

the amount of rent due. Then the special damage sustained by an improper sale is all that can be recovered, and may be measured by the difference between the real value of the goods and the under price at which they sold, but the rent due must be deducted from the gross amount. The case is a very plain one, when we look at section 19 of 11 G. 2. c. 19.; but unless that enactment is kept in view, a great deal of argument might arise on the previous act of 2 W. & M. under which the act of selling without appraisement became unlawful. Then is not 11 G. 2. c. 19. s. 19. pointed at cases where the original seizure being legal, the subsequent disposition of the things seized was illegal? That act separates the distress itself from any unlawful act or irregularity afterwards committed by the party distraining, and provides, that for the special damage sustained from the latter, and for that only, the party grieved may recover. Here goods worth 40*l.* were distrained for 40*l.* rent in arrear, and were afterwards sold without the previous appraisement provided by 2 W. & M. They were liable to be sold, though not in this manner, and were only liable to the lien of the landlord for 40*l.* The jury having ascertained the plaintiff's special damage to be 50*l.* and the value of the goods to be 40*l.*, the plaintiff's interest in them is 90*l.*, *minus* 40*l.* due for rent.

VAUGHAN B.—The distress itself remained valid, and the defendant might have distrained again for any deficiency in the value of the chattels taken.

BOLLAND B.—This point arose in *Wallace* v. *King* (*a*), and though not there decided, it sufficiently appears from that case, and on viewing the new remedy given to the tenant by 11 G. 2. c. 19., that all which he is entitled

(*a*) 1 H. Bl. 13. and see *Lyon* v. *Weldon*, 2 Bing. 334.

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to recover, is for the special damage accruing to him by the irregular disposal of his goods when distrained, and not for the value of them.

Rule refused.

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JONES, Assignee of THOMAS, *against* OWEN.

A plaintiff paid into court a sum under 40*s.* as a balance of account, under a rule for staying proceedings on so doing. The rule directed the plaintiff to tax the costs, but the clause that defendant should pay them was struck out, in order that as the cause of action appeared to be under 40*s.*, and arose within the jurisdiction of the county court of the county where the defendant resided, the question of costs might be afterwards discussed. The plaintiff taxed the costs and demanded them from defendant at a time when the judges were absent from *London*. Defendant refused to pay them then, but offered to give a judgment for them for the 4th day of the next term. Plaintiff proceeded to trial, having refused to acquaint defendant whether he went for a further balance or not, and recovered 1*s.* damages. The court stayed the proceedings with costs.

ASSUMPSIT for goods sold and delivered, money lent, paid, and had and received. Plea, general issue. The insolvent had lived in *Cardiganshire*, where he had been editor of a periodical publication, which the defendant, who resided in *Anglesea*, sold there. The work was consigned to him in lots on the terms of sale or return, he being charged trade price for it. On an account stated between the insolvent and the defendant, the balance due to the former for sales was found to be 7*l.* 6*s.* 6*d.*, of which the defendant paid 6*l.* 2*s.* 11*d.* in money, and in unsold copies returned as cash at the price charged, leaving a balance of 1*l.* 3*s.* 7*d.* unpaid at the time of bringing the action. A summons was first taken out to stay proceedings on payment of 1*l.* 1*s.* 1*d.* only, but on discovering the mistake, 1*l.* 3*s.* 7*d.* was afterwards offered to the plaintiff's attorney, which he refused unless his costs were paid, and also refused to state what sum he went for. The defendant refused to pay such costs, on the ground that the court would stay proceedings without allowing them, because though the venue was laid in *Cardiganshire*, the whole cause of action accrued

in *Anglesea*, where the defendant lived, and being under 40*s*. the county court there was the proper tribunal (*a*). The defendant by motion in court on 31 *Jan.* the last day of *Hilary* term, obtained a rule to stay proceedings on bringing into court the sum of 1*l*. 3*s*. 7*d*., containing the clause directing the plaintiff to tax his costs (*b*), but omitting the usual clause directing the defendant to pay costs to the plaintiff. The court directed that omission, in order to give the defendant an opportunity to move in the next term to stay proceedings on the above ground, after the money had been taken out of court; but refused to strike out the part which directs the plaintiff to tax the costs, because as he would have to apply to the court for them, the defendant would then have the opportunity of answering his affidavits. 1*l*. 3*s*. 7*d*. was paid into court. On the day after the term the plaintiff served an appointment to tax. On the 13 *February* the defendant served the

(*a*) See cases, Tidd, 9th ed. 516.

(*b*) The following is the form of the rule. The words in italics are those which in this case were omitted.

"In the Exchequer of Pleas.

Term in the year of the reign of King *William* the Fourth.

day of } Upon the motion of Mr. of counsel for the defendant, It is ordered, that the said defendant bring into this court the sum of to be paid to the plaintiff, attorney or agent; and if the plaintiff will accept thereof with costs to be taxed in full discharge of this suit, that then the plaintiff shall proceed to tax such costs. *And the said defendant shall also pay to the plaintiff, attorney or agent, such costs,* and that thereupon all further proceedings in this action shall be stayed. And if the plaintiff will not accept of such sum with costs in full discharge of this suit, then the plaintiff to be at liberty to take the said sum of out of court, and to proceed in cause; but that in that case shall suffer a nonsuit at the trial of the said cause, unless demand shall be found to exceed the said sum of . And that if demand shall be found to exceed the said sum of , then that shall take verdict for the excess only."

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order of court of 13 *January* on the plaintiff's attorney, and afterwards took out a summons in order that a baron at chambers might decide whether the 1*l.* 3*s.* 7*d.* should be paid out with or without costs, but did not produce the order of court to him. On the 22d the baron held, that if the plaintiff had agreed to reserve 1*l.* 3*s.* 7*d.* for the debt due, his attorney would be entitled to costs. On the 25th the plaintiff's agent in *London* taxed his costs, pursuant to the rule for paying money into court, and demanded them from the defendant's attorney, who refused payment. The judges being on circuit, and the C. J. of K. B. refusing to interfere, the defendant could not move to stay proceedings, and received notice from the plaintiff's agent that if the costs were not paid by 1st *March* he would make up the issue and go to trial. On the 8th *March* the defendant's attorney wrote to the plaintiff's agent to know if the plaintiff meant to proceed for costs only or for any further balance due, and offered to give him judgment for 1*l.* 3*s.* 7*d.* and costs, to stand for the 4th day of *Easter* term, so as to afford time for an application to the court. An evasive answer being returned, he again sent a letter, that if he did not hear immediately to the contrary, he should conclude that the plaintiff was proceeding for a balance, and should come prepared to defend accordingly. This letter was returned without an answer. The plaintiff's agent in *London* had ample time to apprise the attorney in the country of the correspondence before the *Cardigan* assizes. At the trial there on the 22d *March* before *Bolland* B. the plaintiff professed to proceed only for costs incurred subsequently to the payment into court, for which purpose he put in the rule of 31 *January* and closed his case. He had a verdict for 1*s.* nominal damages (*a*), the learned judge giving the defendant

(*a*) See *Horsburgh* v. *Orme*, 1 Campb. 558, 559, n.

leave to move to set it aside and to stay proceedings, and that the plaintiff should pay the costs incurred since the payment into court.

*Whitcombe* having obtained a rule accordingly (*a*),

*J. Evans* and *E. V. Williams* showed cause. The rule for payment of money into court is not substantially altered by the omission, and the defendant's refusal to pay costs taxed entitled the plaintiff, by the practice of this court and of C. P., to an attachment, without proceeding to try the cause (*b*), so that the right to go to trial and to get nominal damages was not affected. Affidavits also stated that a balance of more than 5*l.* was due. Then the plaintiff was in the ordinary situation of a plaintiff who goes to trial after receiving part payment.

*Whitcombe* and *J. Jervis* contrà. The rule for payment of money into court being special, was not on that account served so soon as it would otherwise have been; but the plaintiff is notwithstanding deprived of costs, for he might have proceeded in the county court of *Anglesea*. *Flemyng* v. *Davis* (*c*) and *Bateman* v. *Smith* (*d*) show, that a plaintiff who sues in a superior court for a sum above 5*l.* or 40*s.*, will lose his costs if the jury give a verdict for less than those sums, against defendants who are respectively resident within a court of requests for 5*l.* or a county court: *à fortiori* these proceedings will be staid with costs, as beneath the dignity of this court, where nominal damages were all the plaintiff went for at the trial.

(*a*) He also moved to enter a nonsuit, on the ground that the plaintiff having recovered less than the sum paid into court, had by the rule made himself liable to nonsuit; but the court refused the rule on that ground.

(*b*) Tidd, 9th ed. 626. (*c*) 5 D. & R. 791. (*d*) 14 East, 301.

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BAYLEY B. (*a*).—I am of opinion that this verdict ought to be set aside, and that the plaintiff should pay all costs incurred subsequently to 8th *March*, the date of the first letter from the plaintiff's attorney. Money had been paid into court on an order purposely deviating from the common form under which it is the defendant's duty to get an appointment and tax the costs, in order that if the plaintiff took the money out of court the question of costs might be the subject of future discussion. It was accordingly agitated before a learned baron at chambers, on the 22d *February*, Whether the money was to be paid out with or without costs? but his attention was never drawn to the order of court of 31 *January*, which should have been produced by the defendant's attorney. Up to that period, and afterwards to the 8th *March*, nothing appeared to show why the plaintiff should not get the sum with costs. Thus if the cause of action had partly arisen in one county and partly in another, no county court might have had jurisdiction. But on the 8th *March*, during the existence of the order of 31st *January*, the defendant's attorney writes to the agent for the plaintiff's attorney, to ask if the plaintiff is about to proceed for 1*l.* 3*s.* 7*d.* only, or for further damages, and says the defendant has no objection to the plaintiff's taking the 1*l.* 3*s.* 7*d.* out of court, and final judgment with costs to be considered due on the fourth day of the next term, so as to give time to apply to the court to say whether these should be considered costs or not. Instead of a plain answer, which would have saved all the subsequent expense of the trial, a long history is given of so unsatisfactory a nature as to the object of inquiry, that the defendant's attorney again writes, saying, that he should consider the plaintiff as going for damages above 1*l.* 3*s.* 7*d.*, if a clear answer was not given to the contrary before a day named. No answer is sent, and his

(*a*) *Lord Lyndhurst* was sitting in equity.

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letter is returned by the post. That is an intimation that he does proceed; and if no letter to the contrary was received by the attorney in the country from his agent in town, the defendant is justified in expecting that the plaintiff is proceeding to trial for damages. Then the verdict is for a shilling. I therefore think that this case falls within those decisions where the party in an early stage has professed to go for a larger amount, but recovers a less sum, which he had before refused to receive with costs on an order for staying proceedings, *James* v. *Raggett* (*a*), *Powell* v. *Parkinson* (*b*); and that the rule must be absolute.

VAUGHAN B.—These heavy expenses have been incurred from the dogged obstinacy of the plaintiff's attorney in giving no answer to the letter of 8th *March*. At the same time, if the costs when taxed had been paid by the defendant under a protest, all the expenses of the trial would have been saved.

BOLLAND and GURNEY B.s concurring,

The rule was made absolute for setting aside the verdict, staying further proceedings, and directing the plaintiff to pay to the defendant all the costs incurred after the 8th *March;* the plaintiff to have costs up to that day inclusive, as the defendant had not served the rule for paying money into court in proper time.

(*a*) 2 B. & Ald. 776. (*b*) 6 M. & S. 107.

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## FIELD and Others *against* COPE.

Where, in a case of a claim by assignees to goods taken by a sheriff under an execution, a sheriff obtains the benefit of the interpleading act, 1 & 2 W. 4. c. 58. s. 6. by a rule calling on the plaintiffs in the action and the assignees to appear and maintain or relinquish their claims thereto, *semble*, the costs of necessary possession by the sheriff will not be allowed; but he will be suffered to withdraw from possession if the plaintiffs do not appear to the rule.

*Qu.* if the court has power to award such costs?

*WHITMORE* on behalf of a sheriff had obtained a rule calling on the plaintiffs in the action, and on the assignees of the defendant, who had become bankrupt, to show cause why all further proceedings against the sheriff upon the writ of *fi. fa.* issued in the cause should not be stayed till further order, and why the plaintiffs and the assignees should not respectively appear before the court and maintain or relinquish their claims to the goods in question, and abide by any order to be made pursuant to 1 & 2 *Will.* 4. c. 58. s. 6., and why all proceedings on the execution should not be stayed, and why the sheriff should not be allowed such expenses as he should be obliged to pay for keeping possession of the said goods.

The affidavit in support of the rule stated, that the sheriff had seized the goods under an execution against the defendant, and that the assignees of the latter had since given him notice not to sell them.

*Richards* showed cause on behalf of the assignees. The plaintiffs in the suit have since proved under the commission, so that the sheriff is in no difficulty, and cannot be called on by them to proceed. [*Bayley* B. The question whether the sheriff is protected or not, depends on the time when the commission issued.]

The plaintiffs not having appeared, the rule was enlarged by order of the court.

In the interim *Whitmore* obtained a rule to show cause why the sheriff should not withdraw from possession; and both rules came on together. In support of the enlarged rule it was said, that the plaintiffs in the action, who had not appeared, ought to pay the sheriff his costs for keeping possession from the day of

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the claim by the assignees to the time of making the second rule absolute for his withdrawing from possession. To which it was replied, that the practice under the act had been not to allow such costs to sheriffs, who already derived so much indemnity from it.

*The Court* assented to this argument, saying, they would not indemnify the sheriff for costs incurred in the execution of the duty imposed on him by law, and that it did not appear that he might not have sold immediately. They asked if he had any lien by law on those goods? At all events the assignees, who appeared, could not be liable to pay him the costs of possession.

First rule discharged; second rule absolute (*a*).

(*a*) See *Parker* v. *Booth*, 8 Bing. 85.

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DOE on the demise of WALKER *against* ROE.

Rule nisi for judgment against the casual ejector refused, when the declaration had been accepted by an attorney not on the roll of this court.

*GODSON* moved for judgment against the casual ejector, on an undertaking by the attorney for the tenants in possession to accept the declaration and notice. The attorney proved to be on the roll of the court of Common Pleas, and not of this court. He submitted that if an attorney of another court was incompetent to this object, yet that as the lessor of the plaintiff would be delayed in consequence of the above undertaking, were it held otherwise, a rule nisi would be granted.

BAYLEY B.—How could this court summarily punish this attorney, if he should have appeared for persons who have not authorized him to do so? The way in which an attorney of another court may act in this, is,

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by getting some attorney of that court to accept the declaration and enter the appearance for him. That may be done here, and the party will not then be exposed to the expense of two rules, where one would be sufficient.

Motion refused.

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## DOE *against* FALLOWS and Others.

Where the next of kin joined an administratrix in a mortgage of a term possessed by the intestate to secure payment of a debt due by the administratrix in her own right, on a false representation by recital in the deed, that a pecuniary consideration had passed from the mortgagee to the administratrix, and in ejectment for the mortgaged premises the jury found a verdict for the defendants on the ground of fraud, the court refused to disturb the verdict.

EJECTMENT by the mortgagee of a term. One of the defendants was the widow and administratrix of *Joseph Fallows*, and the rest were his children by a former wife. He died possessed of a lease of 99 years in the premises. By a mortgage deed, the consideration for which was expressed therein to be 300*l.* to the administratrix in hand well and truly paid at or before the delivery of the mortgage, but which was in reality an old debt due from her in her own right to the lessor of the plaintiff, she assigned that lease to him, and the other defendants joined her in the execution. At the trial at the summer assizes for *Cheshire* in 1831, the defence was, that the execution of the assignment by the children had been obtained by fraud and collusion between the lessor of the plaintiff and their mother in law; and a letter from the former to one of the children (not made a defendant in the ejectment) was produced, in which his execution of the deed was requested, and he was apprised that the mortgage was intended to secure a bill of costs due from the administratrix to the lessor of the plaintiff as an attorney, but assured him that the deed would never be enforced against him. It was contended that this letter was intended to mislead the other children into

executing the assignment, and that it would afford ground for relief in equity on the ground of fraud; *Scott* v. *Tyler* (*a*), *Hill* v. *Simpson* (*b*), *Nugent* v. *Gifford* (*c*), *Macleod* v. *Drummond* (*d*). *Bolland* B. left it to the jury whether the execution of the deed had been fairly obtained, and they returned a verdict for the defendants.

In *Michaelmas* term last *Lloyd* obtained a rule nisi for a new trial, as for a verdict against evidence, and *John Evans* showed cause. The case stood over that the deed might be produced and inspected by the court. That having been done, and a settlement having been recommended, they in this term refused to disturb the verdict, the Chief Baron saying, that the covenant being express by the children to pay the mortgage money, the undertaking not to call on them would have no effect except in equity, and that the false recital that money had been paid to the administratrix might have induced the children to execute.

On a subsequent day in the term *Bayley* B. said, We intimated our opinions in this case on a former day, but as it will be more satisfactory to the parties that our reasons for discharging the rule should be stated at greater length, we have again conferred together, and in the absence of the Chief Baron it becomes my duty to deliver our judgment.—This was an ejectment on a mortgage deed executed by the defendants and their mother, and the defence upon which the jury found a verdict for the defendants was fraud. The mother was administratrix to her husband, and the defendants were his next of kin. The premises were leasehold. The mother was possessed of them in her own right as administratrix. The foundation of the mortgage was a debt due from her, not as administratrix, but in her own right. The ground upon which

(*a*) 2 Bro. C. C. 431; 2 Dickens, 712, *S.C.* (*b*) 7 Ves. 152.
(*c*) 1 Atk. 463. (*d*) 14 Ves. 353; 17 Ibid. 152, *S.C.*

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the rule nisi for a new trial was obtained was, that the verdict was against evidence. When cause was shown, Lord *Lyndhurst* desired to see the mortgage deed, and the case stood over that the deed might be produced. It was produced accordingly, and on inspection it seems to us to make out the fraud, and fully to justify the verdict.

That an executor or administrator has at law full power to dispose of the assets of his testator, so as to give a perfect title to whoever takes them honestly and bonâ fide, is a proposition on which no doubt can be entertained. That he may make an effectual disposal of them in consideration of a debt of his own, and to discharge his own debt if there be no fraud in the creditor in accepting of such disposal, is also equally clear. But where there is a collusion between the executor and the person to whom he passes the property, and the latter knows that the executor is acting in violation of his trust, and in fraud of the persons interested in the due administration of the assets, the fraud vitiates the transaction, and the attempt to transfer the property is ineffectual and void.

This is established by the doctrine of Lord *Mansfield* in *Whale* v. *Booth* (*a*), and may be collected from the able judgment of Mr. Justice *Grose* in *Farr* v. *Newman* (*b*).

It is the duty of an executor to administer the assets in a due course of administration. It is a breach of trust in him if he does not, and whoever assists him in effectuating that breach is a party to such fraud. Was there then evidence in this case of a breach of trust in this executrix, and was there evidence to show collusion between her and the lessor of the plaintiff—or, in other words, did the lessor of the plaintiff assist her in effectuating that breach? The assignment for a debt of her

(*a*) 4 T. R. 625, n. (*b*) Ibid. 621.

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own was primâ facie a breach of trust; nor was there any evidence to rebut that presumption, or to show that there were any circumstances existing which would justify this application of the assets. Then was there any evidence of collusion between the lessor of the plaintiff and the administratrix? Did he assist her in effectuating this misapplication of the assets? The language of the mortgage not only does not communicate the true state of things, but exhibits a false one; the true state of the transaction being, that the consideration for the mortgage was an old debt due from the executrix in her own right, and that she reserved nothing. The representation made by the mortgage is, that the consideration is 300*l.* to the executrix in hand well and truly paid at or before the sealing and delivery of the mortgage. To prove the fairness of the transaction as to the next of kin, the evidence as to the major part of them was, that the mortgage was read over to them before they executed it. If they understood it when it was so read, they would collect from it that their mother was put into possession of 300*l.*, which they might expect would be applied as it ought to the purposes of the mother's trust, viz. to the discharge of debts, as far as there were debts, and to distribution among the next of kin if there were any surplus; such an expectation might reasonably induce them to enter into a covenant to bind themselves personally for the repayment of this 300*l.*

These expectations then were disappointed when they learn that no 300*l.* was advanced, and that this mortgage supplied no fund for payment of creditors nor for distribution among the next of kin. It is indeed true that one of them was apprised by letter that the mortgage was intended to secure the bill of costs of the lessor of the plaintiff; but there was no explanation that that bill of costs was not incurred on the executorship account,

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not was there any similar explanation to the other next of kin, even to the extent before stated; and though there was an assurance in that letter that the person to whom it was addressed would never be called upon on the covenant contained in the mortgage, that covenant might have put the party under great embarrassment had he been sued upon it by the lessor of the plaintiff, or had he been called on by the other parties for contribution.

Whilst this case was under discussion, a doubt arose in my mind whether the conveyance from the administratrix, if it did not pass the whole interest, would not pass at least that part of it which would ultimately be her share as widow of the termor, or that if the *whole* could not be recovered, a *part* might. Upon consideration, however, I am satisfied that the lessor of the plaintiff is not entitled at present to recover either all or any part. Not the whole, because of fraud on the next of kin; nor any part, because, until the executorship accounts are wound up, it cannot be ascertained whether there will be any surplus, or any part which will belong to the widow.

Rule discharged.

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## NEALE *against* SWEENEY.

Counts for use and occupation and money had and received, are sustainable where the defendant has received rents and obtained attornments from tenants in possession, under an executory contract for a lease to be executed to him by the plaintiff at a rent and from a period to be afterwards ascertained.

ASSUMPSIT. The declaration contained special counts on a submission to an award without deed, counts for use and occupation, and money had and received. At the trial before *Bolland* B. at the *Guildhall* sittings after *Hilary* term, the following appeared to be the principal facts of the case. On the 25th *March*

1829 a lease of the premises in question by the plaintiff to the defendant expired. By agreement of 5 *May* 1829, the plaintiff agreed to let them to the defendant by indenture of lease, for the residue of a term granted to the plaintiff therein, reserving a few days, and subject to the covenants in the original lease to the plaintiff, at a clear net rent to be fixed by two arbitrators named, and by such umpire as they should appoint in the event of their disagreement; and the defendant agreed to accept such lease, execute a counterpart, and perform the agreement. The day from which the (under) lease to the defendant was to begin not being stated in the above agreement, the same arbitrators and their umpire, by another agreement of 6th *June*, were authorized to fix it. By their award of 26th *June* they accordingly fixed the rent at 43*l.* per annum for the residue of the plaintiff's term, beginning on the 24th *June* 1829, and awarded 10*l.* to be paid by the defendant to the plaintiff, for the quarter then ended. No lease was ever executed by the plaintiff to the defendant, and the action was brought for a year and a quarter's rent of the premises. From the 25th *March* 1829 the houses remained in the occupation of the former tenants, who paid their rent to the defendant, and attorned to him from that day. On this evidence the plaintiff contended that the rent so reserved was so much money had and received by the defendant to the use of the plaintiff. The special counts being abandoned on an objection for want of a stamp to the award, the jury, under the direction of the learned baron, gave a verdict for the plaintiff for a year and a quarter's rent, beginning from Lady-day 1829.

*Jones* Serjt. moved to enter a nonsuit, on the ground that even if the agreement of 5 *May* 1829 contained words of present demise, as was held at the trial, still it was an executory contract, subject to the execu-

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tion of the lease, as well as to the term and rent to be fixed by the referees in order to frame that lease. Then the rent of the premises accruing due before the lease executed could only be recovered on a special count, and not on counts importing an executed consideration. When improvements are made by a tenant who is let into possession on the faith of a lease to be executed at a given rent, it would be a great hardship if the lessor, without executing a lease, entitle himself to sue as for use and occupation. But,

*Per Curiam.*—Pending the executory contract, the defendant, by taking the attornments of the tenants in possession, placed himself without authority in the place of the original lessor. Then the occupation by those tenants was occupation by him, and his receipt of rent from them was evidence of use and occupation of the whole premises by him; for he not only received the rents under the executory contract, but also procured attornments to himself. Then the verdict is right for the whole term on the count for use and occupation, and the count for money had and received is also supported.

Rule refused (*a*).

(*a*) See *Hegan* v. *Johnson*, 2 Taunt. 148; *Elliot* v. *Rogers*, 4 Esp. 59, alluded to in *Hamerton* v. *Stead*, 3 B. & C. 482 and 483, in the judgments of *Abbott* C. J. and *Holroyd* J.; *Dunk* v. *Hunter*, 5 B. & Ald. 326.

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## WIMPENNY, surviving Executor of BATES, *against* BATES.

Three actions between the same parties were brought in the Exchequer and one in K. B. They were referred to the same arbitrator, on the terms that the order of reference should be made a rule of the K. B. *or* Exchequer, and the original order was made a rule of court in K. B. The arbitrator awarded distinct sums to the plaintiff in each action. Held, that the order could not afterwards be made a rule of court in Exchequer as to two of the actions there, in which a third party was the real plaintiff, but that his application must be to the K. B.

*HOGGINS* moved to make an agreement of reference (by deed) of two causes between these

parties, a rule of this court, on filing a copy thereof. Four actions between them had been referred, three in this court and one in the King's Bench, to an arbitrator, who had made his award of distinct sums in each, but the original deed of reference was annexed to the rule obtained in the King's Bench. The terms of the order of reference provided that the agreement to refer should be made a rule of the court of King's Bench *or* Exchequer. It appeared that *Wimpenny* brought two of the three actions in the Exchequer for the benefit of *James Bates*, and it was said that if only one execution or attachment should issue in the K. B., *James Bates* would have a difficulty in getting his portion of the proceeds; whereas if the order of reference were made a rule of this court, he would get the benefit of the two actions here by attachment or execution upon separate allocaturs in each.

Lord LYNDHURST C. B.—I do not think that the agreement to refer, by providing in the alternative that it should be made a rule "of the court of King's Bench *or* of this court," authorizes two courts to act on a single submission, which has been already made the rule of one. One award has here been made in four actions, parceling out different sums to be paid with costs by the defendant to the plaintiff in respect of each action. Then the application for separate attachments should be made to the King's Bench, where the order of reference is now a rule, and if it cannot be sustained there we cannot entertain it.

BAYLEY B.—Here there is only one submission, which has been already made a rule of the King's Bench. That court will effect all the objects of justice between the parties. I also think that we should overstep the words of stat. 9 & 10 W. 3. c. 15., if we made a submission to an award a rule of more than one court of *Westminster Hall.*

The rest of the court concurring,

The motion was refused.

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## RING *against* ROXBROUGH.

A declaration by an administratrix stated a debt to the intestate and a promise to pay him in his life-time, laying the day on 2d Jan. 1832. The letters of administration were afterwards stated to have been granted to the plaintiff "after the intestate's death, to wit, on the 11th Jan. 1831." Held, on special demurrer, that this date was repugnant and inconsistent, and that if it could be rejected the declaration would be bad for want of alleging the day on which a material fact had taken place.

Where several distinct causes of action, one of which is not sustainable, are stated in one count in assumpsit, general damages may be given.

Averment of a promise under a *Whereas* is good on general demurrer.

Where the promise is laid to pay on request, the *licet sæpius requisitus* need not be laid or proved.

ASSUMPSIT by the plaintiff, administratrix of *John Ring* deceased. For that whereas the defendant heretofore and in the life-time of the said *John*, to wit, on the 2d *Jan.* 1832, in &c. was indebted to the said *John* in 20*l.* for the work and labour, care and attendance &c. of the said *John*, by the said *John* in his life-time done and bestowed as a surgeon and apothecary at the request of the defendant &c., and in 20*l.* for money lent and paid by the intestate, and in 20*l.* for money received by the defendant to the use of the intestate, and on an account stated between the defendant and the intestate; in the form contained in the *Reg. Gen. Trin.* 1831. Vol. I. 530. The count then proceeded to the general conclusion there set forth;—And whereas the defendant afterwards and in the life-time of the said *John*, to wit, on the same day and year aforesaid in the county aforesaid, in consideration of the premises respectively, then and there promised to pay the said several monies respectively to the said *John* on request: yet he hath disregarded his promises and hath not paid any of the said monies, or any part thereof, to the said *John* in his life-time, or since his death to the said plaintiff, to whom after the death of the said *John*, to wit, on the 11th *Jan.* 1831 in &c. administration of the intestate's goods was granted, to the damage of the plaintiff as administratrix of 20*l.* Profert of the administration, the date whereof is on the day and year in that behalf above mentioned.

Demurrer, showing for causes, that it appears by the declaration that the said defendant was indebted to *John Ring*, now deceased, on the 2d *Jan.* 1832, and it

is therein alleged that the said defendant promised to pay the said *John Ring* the several sums of money in the said declaration mentioned on the said 2d *Jan.* 1832. Whereas it appears in and by the said declaration that letters of administration had been and were granted to the said plaintiff of the estate and effects of the said *John Ring* on the 11th *Jan.* 1831, whereby it is made to appear that the said plaintiff, as administratrix as aforesaid, has not nor could have any legal right to sue the said defendant, or any right of action against the said defendant.

*Archbold* in support of the demurrer.—1st. Administration is stated to have been taken out at a day before that on which the promises are laid to have been made to the intestate; nor is the sense assisted by any statement of the time of the intestate's death. The causes of action, if any, accrued to the plaintiff since the death, and not to the intestate in his life-time as laid. It is questionable if a repugnant allegation of time can be rejected as surplusage, but if it can, and either date is rejected, the declaration becomes bad for want of alleging a date first to the party's debt, and secondly to the promise to pay, both of which are material allegations.

2d. This form of declaration, which consists of one count only, prevailed before *Reg. Gen. Trin.* 1 W. 4. (Vol. I. 530,) and is now sanctioned by that rule. The promise is laid to pay "in consideration of the premises respectively." Then as the consideration is clearly bad, the whole declaration is bad.

[*Bayley* B. The promise to pay is entire, being founded on several different considerations. Many authorities show that where general damages are given upon a declaration consisting of several counts, judgment may be arrested if one count be bad; but if several distinct causes of action, one of which cannot

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be supported, are stated in the same count, it would be no objection that the damages are general (*a*). It is enough if there is sufficient consideration to support one entire promise.]

3d. The form of general conclusion, "*Whereas* the defendant promised to pay," is bad on general demurrer as a fault in substance. For the cause of action as well in actions of contract as of tort must be alleged in the declaration by way of positive averment, and not by matter of introductory allegation. Though in assumpsit *whereas* is properly prefixed to the statement of the consideration, a direct averment of the promise to pay immediately follows. So though in debt on bond it is stated "*whereas* the defendant acknowledged himself to be held, &c." the allegation is positive that he has not paid. Then if the count does not contain such certain affirmation that it may be traversed, that defect would not have been cured by verdict, because it is a defect in substance (*b*).

[Lord *Lyndhurst* C. B. The result of the count is this, that whereas the defendant was bound to pay the plaintiff a sum of money, he has not paid it. The averment of the promise, though under a *whereas*, is a branch of the whole period, and is included in the subsequent sentence, which alleges, by way of positive affirmation, that the defendant has disregarded his promises, and has not paid the money due (*c*). The objection is not taken on special demurrer.]

4th. The promise laid is to pay on request, but no request is alleged. [*Bayley* B. The action is a request. Why should a *sæpius requisitus* be necessary to be stated, if it is unnecessary to be proved?]

(*a*) See 5 Taunt. 27; 6 East, 437, in assumpsit; 4 M. & S. 349; 4 B. & C. 385, in case for false return and escape; and 1 Chitty on Pl. 4th edit. 341, 342.

(*b*) Bac Ab. Pleas (B. 4.)

(*c*) See ibid.

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*Tomlinson* in support of the declaration was desired to confine himself to the first point. The repugnancy relied on is, that the day on which the promise is alleged to have been made is subsequent to that afterwards laid as the date of the administration. But if *Buxton*, executor, v. *Nancolas* (*a*) shows that the promise may be rejected as surplusage, the day on which it is made may be rejected.

[Lord *Lyndhurst* C.B. In that case the whole promise was not struck out, but the action being by executors for money paid by the testator *Benjamin* to the use of defendant, the declaration alleged, that the defendant being indebted, he the said *Benjamin* (testator) in consideration &c., and in the life-time of the said *Benjamin* promised the said *Benjamin* to pay. There the words " the said *Benjamin*" might be struck out at the place where they first occur as insensible without leaving the sense imperfect. It is however necessary that a date should be alleged to a material and traversable fact.]

That rule is not uniform; *e. g.* in real actions it suffices to lay time, as in the reign of the sovereign; mere contradiction in the supposed date of the letters of administration, following the precedent matter, which is sense, will not vitiate it. See per *Holt*, C. J. in *Wyat* v. *Aland* (*b*). Had the date of the grant of the administration been erroneously stated in pleading *ore tenus*, the objection that the date was in the testator's life-time would have been answered by reading the letters of administration to find the true date. The same thing is done here by profert, and credence must be given to the date of the letters themselves. Now in *Bynner* v. *Russell* (*c*) it was alleged that afterwards and when the bill sued

(*a*) 11 B. M. 552.

(*b*) 1 Salk. 324; Vin. Ab. tit. Nonsense, A. pl. 3.

(*c*) 1 Bing. 23.

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on became due and payable, "to wit, on 31st *March* 1832," it was presented for payment. The 31st was a Sunday, but the day being immaterial was rejected as surplusage, and the material fact of presentment was left without an allegation of time. So in this case, the day of the grant of letters of administration is laid under a viz., and if struck out as surplusage, the averment would stand without a date. Here, as in *Bynner* v. *Russell*, the demurrer does not specially point to the want of dates as a defect, by stating as a cause that as one day in the declaration must be rejected, the material averment would be left without a date.

*Archbold* in reply. The plaintiff's demurrer rests on the repugnancy of the dates; and could not be framed so as to speculate on the rejection of a date as surplusage, where it was material that time should be alleged. No such inconsistency with previous matter existed in *Bynner* v. *Russell;* in which case, after striking out the day laid, the time at which the bill became due and was presented remained specifically pointed out. Nor was the plaintiff bound to prove the presentment to have been made on the day laid, as appears from *Denison* & Others v. *Richardson* (*a*), where the necessity to lay some day was acknowledged, but the variance from it in proof was held immaterial.

Lord LYNDHURST C. B.—The court is called on to deal with the first objection on special demurrer. There are two important facts in the case, the original transaction between the intestate and the defendant, and the granting the administration to the plaintiff; and it was necessary to allege a day on which each fact took place. The averment then of the grant to the plaintiff of letters of administration of the property of the intestate was material and traversable. It was

(*a*) 14 East, 291, 299.

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on that account necessary to allege a day on which it took place; but a day is here alleged which is inconsistent or impossible; the substance of the allegation being, that after the death of the intestate, the defendant had promised him to pay the debt, whereas in *Bynner* v. *Russell* the matter rejected was mere form. Again, if the day laid is rejected, no day at all would appear. Then the declaration is bad, and the demurrer must be allowed.

BAYLEY B.—Time and place must be laid in pleading every material fact. It was essential to lay a date to the allegation that the defendant was indebted to the plaintiff, and it would not have been sufficient to state merely that the defendant on a certain day promised to pay. The omission to state a date may be cured, if not pointed out by special demurrer. Three material and traversable facts are here stated. The debt of the defendant, his promise to pay, and the grant of the letters of administration. Now the cause of action, the defendant's debt and the promise to pay, is laid in 1832, whereas the letters of administration are stated to have been granted to the plaintiff in 1831. If to cure that inconsistency we strike out the date of the letters of administration as pleaded, and rely on the profert, that only states the date of them to be the day and year in that behalf above mentioned; and if that is rejected, a day is wanting to a material allegation. The case of *Denison* and Others v. *Richardson* is applicable. That case was an action of covenant to indemnify the plaintiff against bills to be drawn. The special demurrer was, that no time on which the plaintiffs had necessarily paid money on account of the bills was mentioned. The day on which the advance was made by way of discounting the bills was stated; but as the bills had some time to run, it could not be said

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that the plaintiffs were obliged to pay their amount on that day; and the demurrer was allowed. In *Bynner* v. *Russell*, after rejecting the 31st day of *March*, the statement remains, that when the bill became due it was duly presented for payment, which is in substance an allegation of time, and distinguishes that case from the present. It was said, that as the defendant had not set out the letters of administration on oyer, he could not object to their date, but the plaintiff might have had them enrolled before joining in demurrer, which is the ordinary course (*a*).

VAUGHAN B.—As the whole foundation of the plaintiff's title to sue in this action rests on the letters of administration granted to her, the grant of them is a material and traversable fact, requiring a statement of the day on which it took place. If in consequence of the repugnancy of the date laid it is rejected, no substantial designation of time is, in this case, left; whereas in *Bynner* v. *Russell* the time of the presentment, which was material to be alleged, could be sufficiently collected from the terms of the declaration, after the date was rejected. Then as the objection is taken on special demurrer, it must prevail.

BOLLAND B. concurred.

Judgment for the defendant.

(*a*) See 2 Stra. 1241; 1 Wils. 97.

## In re Estate and Effects of CHARLES KEY BRUCE, deceased.

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IN *Trinity* term, 1831, a rule was obtained on the part of the crown, pursuant to 42 *G.* 3. c. 99. s. 2. calling on the executors of *Charles Key Bruce* to show cause why they should not deliver an account, on oath, of legacies and personal property paid or to be paid or administered by them, and why the legacy duties thereon should not be paid.

The affidavit of the executors, in answer to the rule, contained in effect the following facts:—The father of the testator was born in *Scotland*, and having while young gone to *North America*, married an *American* woman. Both resided there permanently till their deaths. The issue of that marriage was the testator, who was born in *Maryland* about 1764, and while a boy, was sent to *Scotland* for education. About 1788 he sailed for *India*, being stated in the ship's books to be an *American*. He remained in *India* till 1818, having engaged in mercantile pursuits there, but never having held any appointment under the King or the East India Company. In 1818 he came to *England*, leaving in *Bengal* the greater part of the property he had acquired, and soon after proceeded to the *United States*, to see the estate his father, then deceased, had left him there. He afterwards returned to *Europe* with the intention of visiting several places on the continent and in *Great Britain*, and to arrange the removal of part of his property to *America*. He finally returned to the *United States* about 1824, where he engaged in agricultural pursuits; and continued to draw his pro-

A testator, being a subject of the *United States* and resident there at his death, appointed executors, being *British* subjects living in *Great Britain*, and bequeathed legacies to *British* subjects resident at home and in *India*, and to *Americans*. The legacies to the residents in *India* and *America* were paid abroad from the testator's assets in those countries; and the surplus assets, which ultimately became available for the payment of the legatees in *Great Britain*, being partly in the *British* funds and partly remitted here from *India* in money, were placed in the Bank of *England* in the name of the accountant-general, to the credit of a suit in chancery commenced by the *British* legatees. Held, that the testator not being a *British* subject, his personalty wherever situate was foreign, and that his legacies were not liable to legacy duty.

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perty thither till his death on 23 *December* 1826, which took place at his residence in the county and state of *New York*. By his will, dated 19 *December* 1826, he described himself as "*Charles Key Bruce*, late of *Calcutta*, now of *Richmond*, county and state of *New York*," and bequeathed nearly 33,000*l.* in legacies to persons resident in *England*, *Scotland*, *India*, and the *United States*, many of them being his relations, and mentioned as belonging to various of "his majesty's" ships and regiments. He directed his executors to sell as well his real property in the *United States* and *Bengal* as also his whole personalty, and to apportion the same among his legatees, according to the amount of their several legacies, and appointed three executors, all being *British* subjects resident in *England*. At his death he was possessed in *Great Britain* of about 1650*l.* stock in various *British* funds, and of about 6282*l.* in bills remitted from *India*, and of much larger property in *India* and the *United States*. The executors took out prerogative probate, and paid duty on effects not exceeding 10,000*l.* Certain of the *British* legatees filed a bill in chancery against the executors for an account and administration of the personal estate; and the decree referred it to the master to take an account of such personalty as was not specifically bequeathed and possessed by them. They were to be at liberty to appoint persons respectively resident in *India* and *North America*, and approved by the master, to take out administration with the will annexed, to the testator's effects in those countries, or to prove the will or obtain letters of administration there, and to collect the outstanding personal estate and pay it over to the executors in *England*, who were to pass their accounts before the master, and pay the balances which should be reported due from them into the Bank to the credit of the cause. The administrators, who were accordingly

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appointed by the executors, got in and sold the foreign effects, and having paid the legacies bequeathed by the testator to persons resident in *India* and the *United States*, remitted about 30,000*l.* from *India* to the executors in *England*; which having been invested in bank annuities, were transferred by them to the name of the accountant-general at the bank of *England*, to the credit of the cause. 23,000*l.* were collected in *America*, but no surplus was remitted. By order of 4 *February* 1831, the stock was ordered to be sold, and the produce to be apportioned and paid among the *British* legatees in specified proportions. That sale produced 33,975*l.*, which was apportioned accordingly; but the accountant-general refused to pay the different sums to the legatees without the production of stamped legacy duty receipts, or a certificate from the comptroller of legacy duties, that no duty was claimed on the legacies in respect of which such sums were payable.

Cause was shown for the defendants in *Trinity* term last, and again in this term, by *Jervis* and *Wigram*; the rule being supported by the *Solicitor-General* and *Amos*, for the crown.

Arguments for defendants.—The exclusively foreign character of this testator establishes the distinction between this case and all those which have preceded it; for at the time of his death his domicile was *American* and not *British*. His *domicilium originis*, which was *American*, was fully confirmed by his ultimate settlement and death; so that no inference to the contrary can arise from his intermediate absence for education and the acquisition of wealth (*a*): nor was he

(*a*) See *Somerville* v. *Somerville*, 5 Ves. 787. 753. *Brissonius* de Verborum significatione, verb. Domicilium.

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a *British* subject; the treaty of *September* 1783, between *Great Britain* and the *United States*, having constituted him an *American* subject; and "a declaration that a state shall be free, sovereign and independent, is a declaration that the people composing the state shall no longer be considered as subjects of the sovereign by whom such declaration is made." *Doe* d. *Thomas* v. *Acklam* (*a*). Though the wording of the 55 *G.* 3. c. 184. Sched. Part III. that duty shall be payable "for *every* legacy given by will, &c. of *any* person who shall have died after 5 *April* 1805," would, if taken in its full sense, include foreign testators; *in re Ewing* (*b*) shows it to be confined *quoad* legacies to *Great Britain*. The domicile of the testator is the only criterion by which the legacy acts may receive a reasonable intendment and certain operation, so as in all cases to fix the duty on the estate of the person in certain intended to be burdened with it. To prove that, it is necessary to show that neither the character of the legatees or of the personal representatives, whether *British* or foreign—nor the nature or situation of the assets, or of the places of their distribution, taken singly or collectively—will point out a definite class of persons upon whom the act can be held, by reasonable intendment, to operate in any but a precarious and uncertain manner.

First, as to the character of the legatees. 36 *G.* 3. c. 52. s. 32. provides for payment of legacy duty where the legatee is abroad; and *Haye* v. *Fairlie* (*c*) shows that if a testator dies abroad, and his executor resides, proves the will, and administers the effects abroad, and remits a legacy to a legatee in England, no legacy duty is payable. Nor can the *situs* of the property define the class intended to be charged with duty; for *in re*

(*a*) 2 B. & Cr. 796.
(*b*) Vol. I. 103, &c.
(*c*) 1 Russ. R. 117.

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*Ewing* shews decisively that personalty, wherever situate, follows the testator's domicile. Again, any executor, within the year allowed him by civil as well as English law for calling in the assets, might lawfully change their *situs* to a foreign country, and having administered there, might transmit to *England* a specific legacy, without incurring liability to duty. Still less can the character of the executor, British or foreign, govern the question, whether legacy duty be payable or not? Thus, if a testator possessed of property in *Great Britain*, appoints an executor in *India* as well as *Great Britain*, either or both executors may die before the testator, or may renounce, and a foreigner, if interested, might obtain administration with the will annexed. Again, it might occur that an executor might prove, and die before administration. Then, does the fixing *Great Britain* as *a place of distribution or administration* clearly indicate that legacy duty is payable? *Hay* v. *Fairlie* shows that no legacy duty is payable on a legacy transmitted here from *India*, the testator's property having been administered there. A supervening necessity for the legatees to institute a suit here for such a legacy, whether against an agent to whom it had been transmitted, or an executor who, having acted under an *Indian* probate, might have brought the money with him here, cannot affect the question of the legatee's liability to duty.

[*Bayley* B. In *Logan* v. *Fairlie* (*a*) the legacy lapsed by the death of Mrs. *Logan* the legatee, in *England*, during the testator's lifetime. That appears to have occasioned the vice chancellor's opinion in that case, that British administration should have been taken out by the children of Mrs. *Logan*. That circumstance did not occur in *Haye* v. *Fairlie*.]

It is true that the executors are liable to pay and

(*a*) 2 Sim. & Stu. R. 284, 291.

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are sued in chancery, in respect of the probate granted to them in *Great Britain*. The probate granted here is merely to perfect the title given by the *American* laws to recover the property situate in *Great Britain*. Thus probate duty may be payable on property situate here, though *quoad alia* foreign, *e.g.* if out of a very large property 20*l.* only is situate here, and the executor is compelled to administer it here. If, as in *Attorney-General* v. *Dimond* (*a*), probate is to be confined to property situate in this country, the legatee can only be entitled to sue the executor here in respect of that property; and the court will not lay down as a rule, that if a small sum be here, the legacy duty shall attach on the rest of the property abroad, of whatever amount; but that if no such sum be here, or if here, is waived by the parties entitled, such duties shall not be payable. Again, supposing a legacy duty to exist in *America* as well as in *England*, a double duty might be payable.

The testator's domicil at his death is therefore the only circumstance applicable to all cases; for if it be *British*, the legacies are liable to duty; and if foreign, they are exonerated. It thus prevents the fiscal laws of one country from acting on the property of the subjects of another: see per Lord *Hardwicke* (*b*). As *Ewing*'s case decided, that though the *situs* of the property might be foreign, yet that the domicil being *British*, legacy duty was payable, a foreign domicil will exempt it from that duty. *Attorney-General* v. *Cockerell* (*c*), and *Same* v. *Beatson* (*d*), do not disprove this; for, in the first case, neither the domicil or the fund were decided to be *Indian*, while the testator's intent to return hither was ascertained. In the second, the testator, after leaving *India*, was lost on his voyage

(*a*) Vol. i. 243.
(*b*) *Pipon* v. *Pipon*, Ambl. 57.
(*c*) 1 Pri. 165.
(*d*) 7 Pri. 360.

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home, and his intentions not being ascertained, it is difficult to say where his domicil was at his death(*a*). *Ewing*'s case has opened the law laid down in these cases, the judgments in which mainly proceeded on the testators being *British* subjects.

[*Bayley* B. So in the *Fairlie* cases the testator was a *British* subject. Lord *Lyndhurst* C. B. In *Attorney-General* v. *Cockerell* it is clear that the attention of the court was drawn to the testator's domicil, and that it was throughout assumed to be *Indian*. In *Attorney-General* v. *Beatson* the testator had been resident in *India*, and all the funds were there, but being remitted to this country to one who administered them here for the residuary legatees, they were therefore held liable to the duty.]

Nor can the accident of a suit being instituted here by the *British* class of legatees, though it prevents the whole assets from being administered abroad by subjecting the trust to be performed *quoad* the *British* assets, under the directions of the court of chancery, subject the *Indian* and *American* legatees to payment of legacy duty.

[Lord *Lyndhurst* C. B. In *Haye* v. *Fairlie*(*b*), as in this case, the fund had passed through the Court of Chancery, but that circumstance did not affect that decision.]

*Arguments* for the Crown.—Admitting that 55 *G.* 3. c. 184. is limited to *Great Britain*, this testator is here dealt with as a *British* subject, and unless his domicil be exclusively *American* his estate is liable. Now the executors are *British*, and the mass of legatees so also, some of the latter being also named in the will

(*a*) See *Munroe* v. *Douglas*, 5 Madd. R. 379; *Anstruther* v. *Chalmer*, 2 Simons R. 1.

(*b*) 1 Russ. R. 117.

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as "in his majesty's service." The residence in *India* for thirty years gave him a substituted domicil there (*a*). In *Bruce* v. *Bruce* (*b*), Lord *Thurlow* C. said, "a *British* man settles as a merchant abroad, enjoys the privileges of the place, he may mean to return when he has made his fortune, but if he dies abroad, will it be maintained that he had a domicil at home?" As to evidence that the substituted domicil was afterwards done away with, no letters or expressions of the testator on that subject appear, and the bulk of his fortune remained in *India*.

[Lord *Lyndhurst* C. B. The facts nearly amount to demonstration, that if a domicil had been acquired in *India*, the testator afterwards intended to acquire or resume one in *America*.]

The domicil, though not expressly declared to be *Indian* in *Attorney-General* v. *Cockerell*, was assumed to be *Indian*, and turned on the act of administration in *England* of *Indian* property found there unappropriated. In *Attorney-General* v. *Beatson* the domicil was said to have been in *India*, and could not be lost, it not having been found that the testator left *Madras* intending never to return there more. In *Logan* v. *Fairlie* it was held, that the sum merely remitted to the party entitled to receive it was not liable to legacy duty, but that the legacy to the person previously dead was unappropriated and therefore liable. This case ascertains the fact which was in doubt in *Logan* v. *Fairlie*, and is ruled by it; for in the words of the vice chancellor, a part of the assets of this testator is found in *England* in the hands of the agent of the executor, without any specific appropriation, and legatees in *England* institute a suit here for the payment of their legacies out of such unappropriated assets.

In *Ewing*'s case the executors had as such got pos-

(*a*) See *ante*, 377. (*b*) 2 B. & P. 229, n.

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session of foreign stock, and had administered it by executing warrants of attorney for transferring it to the legatees, on which act of theirs the legacy duty was held to attach; so that the question of domicil was secondary, and only arose in order to show the property, though foreign, to be in the executor.

[Lord *Lyndhurst* C. B. The principle of law on which *Ewing*'s case was decided, does not differ from that on which *Logan* v. *Fairlie* turned, though the fact whether appropriation in the last case took place in *India* or *England* seems to have been differently apprehended. In *Ewing*'s case the executor first transferred the stock into his own name, and then executed the warrants of attorney. The court having held the property to be personal, the liability to legacy duty followed as its consequence. That appears from the conclusion of the C. B.'s judgment (*a*). There the defendant's counsel contended, that so far as related to the property in foreign stock, *British* administration was not necessary to the payment over by the executors; but the court held that it was personal property, and consequently that legacy duty was payable in respect of the act done by the executors, who handed over the legacies here. *Bayley* B. I doubt whether any order for payment of legacy duty was ever made in *Logan* v. *Fairlie* (*b*).]

But conceding the testator's domicil to be *American*, the payment of the assets into the bank to the credit of the cause is an appropriation of them here by the executors (*c*), on which legacy duty would attach; for the legacy acts impose duty on the plain fact of payment by

(*a*) Vol. i. 104, 105.

(*b*) In that case the crown, on condition of paying the legacy duty, which was a small sum, did not press the parties to take out administration.

(*c*) Such payment seems an appropriation to the trusts of the will. *Hill* v. *Atkinson*, 3 Pri. 399. 404.

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an executor within the limits of their operation. Supposing on the contrary, domicil to be the test of their application, and that a man domiciled here should make his will here of personalty in *America*, appointing *American* executors, and bequeathing legacies to *Americans*, that would be the converse of this case, and the defendants would say, that as the property must follow the domicil, legacy duty would attach. But how could payment be enforced if no persons or property existed here? Were the funds in this country, an act of appropriation by any executor would take place by probate; and if a foreign executor took them abroad, they would be liable to legacy duty for his "retainer" here. The liability would depend on the act of appropriation being in this country or not. So if legacy duty existed in other countries, it might be only payable where that act took place. [Lord *Lyndhurst* C. B. If funds were collected here by a French executor, and distributed by him in *France*, would that be a "retainer" or appropriation here?] If any legatee was paid here, it would. The acts, therefore, lay stress on the executors' appropriation, by the fact of payment here, and not on the varying circumstances of the testator's domicil. *Attorney-General* v. *Cockerell* (*a*) expressly turns on that fact, as do also the *Fairlie* cases.

Here the executors do acts of appropriation here, which are the means of collecting and bringing the property here, fix the rights of *British* legatees, and satisfy them here. Is not this a "retainer, delivery, payment, satisfaction or discharge" (*b*) of the legacies in this country? Surplus funds remitted from abroad to the executors will be liable to legacy duty, if fixed by their acts here in *British* legatees. For the foreign administration was subject to the previous probate and decree here, under which also the ultimate distribution to the

(*a*) 1 Pri. 181. (*b*) 36 G. 3. c. 52. s. 6.

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legatees under that authority took place here. So these executors were brought to account in *England;* whereas in *Attorney-General* v. *Cockerell* the will had been proved by *Duff*, one of the executors in *India*, and the assets realized there, and it was only on his death that the defendant, another executor, was obliged to prove the will in *England*, in order to receive such realized assets from the executors of *Duff*. There the defendant represented the original testator. [Lord *Lyndhurst* C. B. The payments to foreign legatees by persons acting as administrators abroad, were substantially made by the executors according to the decree, those administrators being liable to be sued in foreign courts.] It may be conceded, that if assets, situate and collected in *America*, are paid to legatees there in a due course of administration, they would not be liable to duty, though the surplus remitted would (*a*).

The judgment of the court was afterwards delivered by BAYLEY B. at the request of Lord *Lyndhurst* C. B. who was absent.

In this case the court entertains no doubt. The testator's father, a native of *Scotland*, went, when young, to *America*, fixed his residence and married there, and with his wife lived and died there. The testator was born in *Maryland*, in the year 1764; he was sent when much under twenty-one years of age to *Scotland*, and in 1788 sailed to the *East Indies*, where he continued till 1818, a period of about thirty years. When he went out in 1788, he was entered in the ship's books as an *American*. In 1818 he returned

(*a*) On the first argument the court adjourned their judgment till *Jackson* v. *Forbes*, (*ante*, 354,) a case involving, as then stated (pp. 373, 374), a question of probate as well as legacy duty, should be argued. That case having been heard, judgment was given in this case on the last day of the term.

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to *Europe*, leaving behind him in *Bengal* the greater part of the property which he had acquired in mercantile pursuits, and then went to *America* to see his family, and the property which his father, then deceased, had left him there. He afterwards left *America* to visit different parts of *England*, *Scotland*, and the Continent, and to make arrangements for the removal of the greater part of his property to *America*. On his final return to the *United States*, he commenced drawing his property there, and continued to do so till his death, which happened on the 23 *November* 1826, at his residence in *New York*.

He describes himself in his will as "late of *Calcutta*, and now of *Richmond*, in the county and state of *New York*." By his will he gave legacies to persons, some of whom were then resident in *Great Britain*, some in *India*, and some in *America*. He left a personalty in *England* under 10,000*l*. and bequeathed legacies to *English* residents to an amount exceeding 30,000*l*. The probate duty has been paid on the funds in Chancery, and a bill has been filed by some of the *British* legatees for an account of the testator's estate. The issue has been, that the assets have been sold, and the produce, 33,975*l*., has been apportioned amongst the *British* legatees. The question is, whether the legacy duty is payable upon that sum; and upon consideration, we are all of opinion that it is not.

Upon the facts stated, it seems to us to be clear that the testator was, at the time of his death, a citizen of the *United States*, and not a *British* subject; that his personalty, wherever situated, was to be deemed not *British*, but *American* property; and that neither he nor his property were liable, generally, to be bound by *British* statutes, or to contribute to the support of the *British* government. He was born indeed in a

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province which, at the time of his father's death, was a part of the *British* dominions; but upon the first treaty between this country and the *United States*, he had the option of continuing to be a *British* subject or of ceasing to be such, and becoming to all intents and purposes merely an *American*. It seems to us that he made his election of the latter. In 1788, which was after the date of the treaty between this country and the *United States*, he went to *India* from this country, describing himself and being entered in the ship's books as an *American*, which would of itself be sufficient to show his election. In his will he described himself virtually as of the *United States*, and was resident there when he died. He was not therefore a *British* subject when he made his will or when he died; nor was he or, as it seems to us, his personal property bound by the statutes of this realm; so that though he had, when he died, some personalty in *Great Britain*, it must, according to *Ewing*'s case, be deemed foreign property, and liable to *American* legacy duty, had any such existed; and he had a right to transmit the personal property which he had here to whom he would, free from every *British* burden.

Had this testator made foreign executors, and given no legacies except to foreigners, there can be no doubt but that the executors would have been entitled to have removed the whole of the property from this kingdom, and to have paid the foreign legatee in full, without deduction except for the probate duty, which would be imposed upon that property of his which he suffered to be in this kingdom; so that if his executors or legatees had been foreigners, they would not have been liable to the legacy duty. These executors and legatees are indeed *British* subjects, and as such subject to *British* laws; but can those facts vary the case as to them where testator was a foreigner and the property to be deemed

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foreign? They are the medium by whom the property belonging to the testator is to be distributed. Can it make any difference that the legatee is a subject of this realm? The duty is on the legacy given by the testator; and though its burden falls on the legatee, it falls also on the gift of the testator, diminishing also what he gives. Now, had the legatee been a foreigner, he would have taken his 100 per cent.; but being a *British* legatee, resident in *Great Britain*, it is contended that the testator gives only 90 per cent., and 10 per cent. to the *British* government; a strong motive to discourage a foreigner from investing property in *British* personalty, or making *British* executors or legatees, if the circumstance of their being personally amenable to the laws of this country would render the property bequeathed them by a foreigner liable to such a deduction.

Therefore upon the principle that the testator is not a *British* subject, or bound by the laws of this kingdom, and that he is entitled to consider his property, though locally here, as not being the property of a *British* subject, but of a foreigner or an *American*, we are all of opinion that the legacy duty in this case is not payable. The circumstances I have mentioned plainly distinguish this case from the authorities of the *Attorney-General* v. *Cockerell*, the *Attorney-General* v. *Beatson*, and *Logan* v. *Fairlie*; for without expressing any opinion whether the legacy duty would or would not be payable, where the testator was a *British* subject, but not resident in *Great Britain* when he made his will, but disposing by it of property which he happened to have in this kingdom at that time, those cases are distinguishable in this respect, that in each of them the property belonged to *British* subjects, who being resident in *India* and originally *British* born, were therefore liable to be bound

by all acts made by the *British* parliament, in terms sufficiently comprehensive to include them. That case, as it seems to us, is otherwise with this testator. The legacy duty is in substance a burthen upon a testator's property. Then if he were not to be bound by the laws of this country, every 100*l.* which he proposed to give to his legatees would pass into their hands, whilst a decision that his property was liable to the burdens of this kingdom, would prevent any *British* legatee from obtaining more than 90*l.* That, as it appears to us, is not the principle upon which these acts of parliament ought to be construed. We are therefore of opinion that the legacy duty is in this case not payable, and consequently that the

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Rule must be discharged.

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## THORPE *against* WORTHY.

A judgment had been signed under a cognovit for paying debt and costs as between attorney and client. The defendant never appeared, and had no attorney. The notice of taxation being fixed for the following *Wednesday*, was sent by post on *Saturday*, 5 *May*, the day of its date, to an attorney living at *Exeter*, who had served the defendant with process in that neighbourhood. The defendant having left his former residence, the intended service could not be effected, and on the 7th the notice was sent on to an attorney at *Torrington*, who served the defendant on that day, at a place four or five miles off, and charged for the service (including postage, journey, horse-hire, and letter to the plaintiff's *London* agents,) 1*l.* 12*s.* At the taxation on the 9th, the master struck out that

The reasonable costs of serving a notice of taxation on a defendant residing in the country, and having no attorney, will be allowed, and are not to be restricted to the charge for a letter by post.

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charge, on the ground that the notice might have been sent by the post, and only allowed for a letter to the correspondents at *Exeter*, as if sent by post to the defendant at that place.

*Kelly* moved to review the taxation. The question is not whether 1*l.* 12*s.* is a reasonable charge, but whether any thing more than the costs of a letter by post is in future to be allowed for service of a notice of taxation? Now *Reg. Gen. Trin.* 1 *Will.* 4. [ Vol. I. 523.] is here complied with, and defendant might have attended, as he had a clear day's notice of taxation. Besides, the service should be effected in such a manner as would enable the plaintiff to prove it to have taken place in time, but a notice sent by post to places not being post towns, would seldom arrive in time to be of use.

BAYLEY B.—The enabling a party to attend the taxation of costs is an object of great importance, and I think that the master should allow expenses reasonably incurred in serving a defendant with the notice of taxation, in such a manner as would put him in a condition to attend if willing to do so.

*Per Curiam.*—Referred to the master to review and allow a reasonable sum for the service made, having reference to the terms of the cognovit.

1832.

## JOURDAIN *against* GUNN.

Costs of bail changed by judge's order for that purpose, must be paid before the bail can justify.

BAIL had been changed by order of a baron under *Reg. Gen. Trin.* 1 *W.* 4. [Vol. I. 521.] The substituted bail appeared to justify. They were opposed, on the ground that the costs of the order had not been paid; the order being conditional "till costs paid."

In support of them it was said, that it was sufficient to produce the order in court, and to tender the costs; to which it was objected, that an appointment to tax should have been made, and that the offer to pay costs was only to pay such "as the plaintiff's attorney should be entitled to."

GURNEY B.—The defendant offers to pay whatever costs are due. The plaintiff says he does not know what that sum is, as no appointment to tax has been given. The bail cannot justify till the costs are paid.

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## DARLING *against* HUTCHINSON.

Affidavit of justification of bail sworn in the country, stated the bail to be possessed of property to a certain amount, without further stating that each of the bail were worth double the sum for which defendant was held to bail above his own just debts, or every other sum for which he might be then bail:—Held bad, but time given to amend on payment of plaintiff's costs of the day occasioned by the affidavit.

BAIL were stated by affidavit to live at *Newcastle*, and to be possessed of property consisting of book debts to the amount of a sum stated.

*Busby* objected that the affidavit was insufficient, as purporting to comply with the form of affidavit in *Reg. Gen. Trin.* 1 *Will.* 4. [Vol. I. 521 & 524.]; for the bail might be specially possessed, or might receive the property only for the occasion to enable him to swear that affidavit, without being worth double the sum for which the defendant was held to bail, above his own just debts,

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or the sums for which he might then be bail in other actions, as required by *Reg. Gen. Hil. 2 Will.* 4. No. 19. [*ante*, 342.]

GURNEY B.—After referring to those rules and to *Reg. Gen. Trin.* 1 *Will.* 4. No. 3. [Vol. 1. 521], gave a week's time to amend the affidavit, on payment, by defendant, of the plaintiff's costs of the day occasioned by the affidavit, and on terms of taking short notice of trial and putting the plaintiff in the same situation as if justification had then taken place.

A like point arose and was similarly disposed of, 11 *November* 1832, in the case of *Simpson*'s bail.

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## THYNNE *against* WOODMAN.

A special demurrer is in nature of a plea in bar, and may therefore be had after a general imparlance.

The court will not grant a rule authorizing a plaintiff to sign judgment for irregularity, but will leave him to take that step at his own peril.

THE declaration, entitled generally as of *Hilary* term last, was filed as of that term on 1st *February*, the day after it ended. The special memorandum stated the bringing of the bill into the office of the clerk of the declarations on the 11th *January*, and the bill proceeded to state, that on the 20th *January* the defendant was indebted. On 10th *February* a general imparlance was granted to this term; on 10th *April* defendant demurred specially, assigning for cause, that by the plaintiff's bill alleged to be brought in on 11th *January*, the defendant was stated to be indebted to plaintiff on 20th *January*, that being a day after the bill was filed, and within the term of which the declaration was entitled generally. The plaintiff being ruled to join in demurrer, made up and delivered a demurrer book to the defendant's attorney, the joinder in demurrer not being signed by counsel.

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*Mansel* for plaintiff, moved for leave to sign judgment for irregularity in that omission. The plaintiff cannot reply; and as the defendant could not, after imparlance, have pleaded in abatement, he cannot demur specially. In *Tompson* v. *Colier* (*a*), it is said, that a defendant, by entering into defence and by imparlance, admits the bill to be good. He also cited *Brewster* v. *Capper* (*b*).

BAYLEY B. (*c*).—We think we ought not to interfere in the manner suggested. It appears to me an entirely novel course to desire the court to authorize a party to sign judgment, for a plaintiff must always exercise any right he may possess to do so at the peril of having it set aside with costs. In support of this motion it has been said, that the plaintiff can adopt no other proceeding; but the obvious course pointed out by this special demurrer is to amend. That can be done at an expense infinitely less than that of this application. The case cited from *Yelverton* was of a plea in abatement, which it is well known can only be pleaded in the first instance, and never after a general imparlance. But here, the defendant being entitled to an imparlance, takes it, and afterwards demurs specially, when he finds from the declaration that the cause of action accrued nine days after the bill was filed. I know of no rule by which a party is precluded from taking advantage of this defect by special demurrer, which is not a dilatory plea, but a plea in bar, as appears by its conclusion. It would be contrary to all precedent to grant this application.

VAUGHAN B.—The step of signing judgment is always to be taken by a plaintiff at his own risk. And

(*a*) Yelverton, 112. (*b*) 1 Wils. 261.

(*c*) Lord *Lyndhurst* was sitting in equity.

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it is not a convenient course to call on the Court to decide *à priori* the question of irregularity in so doing.

BOLLAND and GURNEY B.s concurring,

Rule refused.

*Quære*, if counsel's signature is necessary to joinder in demurrer.

A party to whom a demurrer book is delivered cannot sign judgment while he retains it.

The defendant's attorney afterwards signed judgment as for want of a joinder in demurrer. A rule having been obtained to set aside that judgment for irregularity,

*Crowder* showed cause. The joinder in demurrer should have been signed by counsel, *Brooker* v. *Simpson* (*a*), *Douglas* v. *Child* (*b*). *Reg. Gen. Hil.* 2 *Will.* 4. No. 107. (*ante*, p. 350) does not apply to issues in law. [*Bayley* B. The joinder in demurrer asserts nothing, so that the counsel's signature, which is only required to control improper allegations, is unnecessary.] Secondly. The declaration was entitled generally as of *Hilary* term 2 *Will.* 4. The cause of action is stated in the declaration to have arisen on the 20th *January*, whereas the term began on the 11th. But the demurrer book was afterwards made up with a proper entry by the plaintiff of a special memorandum, thus correcting the error and taking away the ground of the demurrer.

[*Bayley* B. *Dodsworth* v. *Bowen* (*c*) shows the plaintiff might amend the bill by introducing a special memorandum, for the bill is filed some day in the term, which is not necessarily the first day.]

Lord LYNDHURST C. B. — The record is not amended, for the bill is in fact what it was before,

(*a*) 2 Bos. & P. 336, n. (*b*) *Id. ibid.* (*c*) 5 T. R. 325.

though now prefaced by a special memorandum, which answers the objection to the general title. But a ground of demurrer remains in the body of the declaration, which still states the defendant to be indebted on a day after the bill filed. That should have been amended under a judge's order. If the demurrer book was not properly made up, the defendant had a right to refuse to accept it, or, if he accepted it inadvertently and found it defective, he might afterwards return it. I think that in this case he should have so returned it on discovering the error, and that then, if at all, he might have signed judgment; but he had no right to take that step after having accepted it, or while keeping it in his possession.

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TRYNNE v. WOODMAN.

The Court set aside the judgment without costs, directing the paper book to be then returned.

*Mansel* in support of the rule.

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## ALEXANDER *against* MILTON.

*CURWOOD* moved to cancel a bail bond for a defect in the affidavit to hold to bail, only stating the residence of the deponent thus, "*A. B.* clerk to *S. A.* and *J. I. I.* of *Chiswell Street, Finsbury*, in the county of *Middlesex*, stable keepers."

The residence of deponent in an affidavit to hold to bail is properly stated as "clerk to *S. A.* & *J. I. I.* of *Chiswell-Street*, in the county of *Middlesex*, stable-keepers," without more particularly describing the residence.

BAYLEY B.—The description of a deponent as "clerk to an attorney," whose address is stated, has been held sufficient, for he may be found at his em-

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ALEXANDER v. MILTON.

ployer's office (a) from nine in the morning to the same hour at night. The same analogy prevails in this case.

Rule refused.

(a) See 1 M. & S. 103. 2 Chitty's R. 15.

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TUCKER *against* COLEGATE.

Where mesne process was returnable on the first day of a term, an application to deliver up the bail bond to be cancelled, for a defect in the affidavit to hold to bail, must be made within the time for putting in bail above.

A BAILABLE quo minus was issued returnable the first day of term. In the affidavit to hold to bail the defendant was stated to be indebted to the plaintiff in the sum of 14*l.* on a bill of exchange drawn by the defendant on and accepted by *Webb*, payable to the order of the defendant at a certain day now past, and duly indorsed to the plaintiff; and in the further sum of 10*l.* and upwards for money lent by the plaintiff to the defendant.

*Godson* obtained a rule to show cause why, on entering a common appearance, the bail bond given to the sheriff of *Middlesex* on the arrest of the defendant in this cause should not be delivered up to be cancelled; and why the plaintiff should not pay to the defendant's attorney the costs of the application, on the ground that the dishonor of the bill by the acceptor was not stated in the above affidavit of debt, *Buckworth* v. *Levy* (*b*). The rule was drawn up on the 28th *April*.

*Tomlinson* showed cause. The defendant is here sworn to be *indebted* to the plaintiff in 14*l.* on the bill;

(*b*) 7 Bing. 251. The affidavit did not show *by whom* the bill was indorsed to plaintiff. See *Lewis* v. *Gomperts*, *ante*, 311.

now if the bill was not due or not dishonored, the plaintiff might be indicted for perjury, *Davison* v. *March* (*a*). That case has been since overruled on another ground, viz. that the affidavit did not show the bill to be due, *Edwards* v. *Dick* (*b*); but the explanation given by *Bayley* J. in *Jackson* v. *Yate* (*c*), that in *Davison* v. *March* the defendant was stated to be indorsee of the bill, and being, as such, only a collateral security, could not be indebted unless the bill had become due and was dishonored, applies to this case, where a drawer is sued on a bill which is stated in the affidavit to have been accepted and to be payable *at a day past*; the absence of which latter statement was the ground of the decisions in *Jackson* v. *Yate* and *Machu* v. *Fraser* (*d*).

But the motion came too late on the 28th *April*, for two further steps had been previously taken by the plaintiff. The writ being returnable on the first day of term, the 16th, the time for putting in bail above by the defendant elapsed on the 5th day of term, it being a town cause; *D'Argent* v. *Vivant* (*e*). On the 16th a declaration was filed, and the sheriff was ruled to return the writ; on the 26th he was ruled to bring in the body, and a rule for an attachment has been since obtained against him.

*Godson* contrà. *Buckworth* v. *Levy* is decisive on the first point. As to time, this application is on behalf of the bail, the defendant having absconded to *Holland*. The sheriff had four days from the first day of term before he could be compelled to return the writ. Then till bail above are put in, they had no opportunity of knowing the contents of the affidavit on which the

(*a*) 1 New R. 157. (*b*) 3 B. & A. 496. See *Machu* v. *Fraser*, 7 Taunt. 171.

(*c*) 2 M. & S. 475. (*d*) 7 Taunt. 171. But see per *A. Park* J. 7 Bing. 252, and *Bayley* J. 2 M. & S. 475. (*e*) 1 East, 330.

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arrest took place. Four other days of business, beginning the 20th (*Good Friday*) and ending with the 24th, are also to be deducted.

BAYLEY B.—This application came too late. The day on which the sheriff would be compellable to return the writ is of no consequence. This being a town cause the defendant ought to have put in special bail within four days, exclusive of the return of the process; and had he proceeded promptly to do so this application would have been too late if, (after rejecting the four days (*a*)) it had been made on the 25th. The defendant is identified with the bail below, and they are interested (*b*) in his putting in and perfecting bail above in due time. Then the interval between the first and fifth days of the term was the period within which the correctness of the affidavit to hold to bail should have been inquired into, to see whether bail above should be put in or not. Had this motion been made within that time (*c*), the plaintiff by discontinuing might have saved costs and issued a new writ; whereas if this rule should be made absolute he would be left in a worse condition, having incurred great expense, and a new writ would be useless.

VAUGHAN B. concurred.

BOLLAND B.—Mr. Baron *Wood* said, in *Warren* v. *Cross* (*d*), that a party must come as early as he can to complain of an irregularity; but that though he may move to set aside irregular proceedings after a further

(*a*) See 1 *W.* 4. c. 3.; 11 *G.* 4. and 1 *W.* 4. c. 70. s. 6.; and *Reg. Gen. Easter* 2 *W.* 4. *post*, 502.

(*b*) See *Chapman* v. *Snow*, 1 B. & P. 133. In *Harrison* v. *Davies*, 5 Burr. 2683, Lord *Mansfield* said, that "nothing can be a performance of the condition of the bail bond but putting in bail;" and a render after bail bond given, but before the return of the writ, was held not sufficient to protect the bail.

(*c*) See per Lord *Kenyon*, *D'Argent* v. *Vivant*, 1 East, 335. (*d*) 9 Pri. 65.

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TUCKER v. COLGATE.

step has been taken, (for a plaintiff might otherwise in all cases cure his own irregularities), yet that whether he must come in the first instance or may wait for a further proceeding, must always be determined by the circumstances, as must the question of costs. He also said that if a party does come immediately to complain, he ought to have his costs if he succeeds in his application. That case was one of nice distinctions, but embraces the present.

GURNEY B. concurred.

Rule discharged with costs (*a*).

(*a*) See *Reg. Gen. Hil.* 2 *Will.* 4. No. 38. *ante*, 343.

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## KERBEY *against* JENKINS.

A cognovit may be given after process sued out, and before it is served.

A RULE for setting aside an interlocutory judgment and subsequent proceedings, for irregularity, was obtained on the defendant's affidavit, that on *24 January* he signed a paper, which was the cognovit on which judgment was entered up, but that he was never *served* with any process.

Cause was shown on an affidavit that the defendant, on signing the cognovit, said he knew what a cognovit was, having signed one before, and thanked the plaintiff's attorney for the indulgence; and that process was *sued out* an hour before the cognovit was given.

*Per Curiam.*—It is not necessary that process should be served before a cognovit is given. It is sufficient if it has been sued out.

Rule discharged with costs (*b*).

*Hoggins* in support of the rule, *Hutchinson* contrà.

(*b*) See *Wade* v. *Swift*, 3 Pri. 513.

1832.

## Ex parte DUNK and RICHARDSON.

Practice on moving for relief against forfeited recognizances.

AMOS moved to discharge a forfeited recognizance, on affidavits suggesting grounds for relief by the court.

BAYLEY B. having asked if he had a constat of the proceedings from the clerk of the estreats office, desired the motion to be made on either of those days in the week when the treasurer's remembrancer was present.

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## PITMAN *against* HUMFREY.

Judgment and execution on a cognovit embodying a matter of agreement of 20*l.* value, were set aside with costs, for want of a stamp on the cognovit; but it was suffered to remain on the file, and having been afterwards stamped, fresh judgment and execution issued on it, and the interlocutory costs given to defendant on the rule for setting aside the former judgment and execution, were set off against the final costs in the cause.

THE defendant being indebted to the plaintiff in the sum of 18*l.* gave a cognovit, in which it was stipulated that judgment should not be entered up till after default of payment on a certain day following. The plaintiff's costs at that time were 10*l.* Judgment was afterwards entered up and execution issued on the cognovit. A rule was moved for by *Mansel* to set aside both for irregularity with costs, on the ground that the cognovit, though containing matter of agreement of 20*l.* value, was not stamped when filed at the exchequer office of pleas, according to 3 *G.* 4. c. 39. s. 3.; and also to take the cognovit off the file and to have it delivered up to be cancelled. *Ames* v. *Hill* (*a*) and *Reardon* v. *Swabey* (*b*) were cited.

The Court granted the rule, observing, that two days' notice of motion not having been given, they could not stay proceedings and that the plaintiff might,

(*a*) 2 B. & P. 150. (*b*) 4 East, 188.

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PITMAN v. HUMFREY.

in the mean time apply to have the instrument stamped; and on *Wightman*'s showing cause they refused to suffer the cognovit to be taken off the file, *Bayley* B. saying, that if any use could be made of it the plaintiff was entitled to it, and that if otherwise, no injury could arise from its remaining there. The following rule was made: The judgment, and all subsequent proceedings to be set aside with costs, the defendant undertaking to bring no action; all the other matters in the rule to be discharged without costs.

The cognovit was afterwards stamped, and a fresh judgment and execution taken out on it. A rule to set off the costs given by the former rule against the costs of the cause, or to deduct them therefrom, was made absolute, subject to the lien of the defendant's attorney for his bill, the payment of the interlocutory costs to the defendant not having been made a condition precedent to the plaintiff's further proceedings. *Doe* v. *Carter* (*a*).

(*a*) 8 Bing. 330.

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## ANONYMOUS.

The venue will not be changed in an action on a specialty, on the ground that the cause of action arose in a different county, and that both parties and all the witnesses resided there, unless on affidavit of merits, and that it would be necessary to call witnesses resident in the latter county.

*J. JERVIS* moved to change the venue in an action of debt on a covenant in a mortgage deed, there being also a count for goods sold, from *London* to *Lancashire*, on the ground that the cause of action, if any, arose in *Lancashire*, and that both parties and all the witnesses resided there. He cited *Foster* v. *Taylor* (*b*).

BAYLEY B.—The defendant's affidavit does not state that he has a good defence on the merits, or that it

(*b*) 1 T. R. 781.

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ANONYMOUS.

will be necessary to call witnesses who reside in *Lancashire* in support of his case.

*Per Curiam.*—Rule refused (*a*).

(*a*) So in *Weatherby* v. *Goring*, 3 B. & C. 551. There being no affidavit of merits, the court of K. B. said, that defendant could not be entitled to change the venue in an action on a specialty, unless it appeared clearly that he would have some witnesses to examine on the trial of the cause, and that till issue had been joined they could not tell whether the defendant intended to set up any defence to the action.

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## REGULA GENERALIS,
### *Easter Term*, 1832.

*Dies non.*

IT IS ORDERED, That the days between the *Thursday* next before and the *Wednesday* next after *Easter* day, shall not be reckoned or included in any rules or notices or other proceedings, except notices of trial and notices of inquiry, in any of the courts of law at *Westminster*.

(Signed by the Judges of the three courts of common law.)

END OF EASTER TERM.

# REPORTS OF CASES

ARGUED AND DETERMINED IN THE

# COURTS OF EXCHEQUER OF PLEAS,

AND

# EXCHEQUER CHAMBER,

IN

# Trinity Term,

## In the Second Year of the Reign of William IV.

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## Drews *against* Coles.

1832.

THE plaintiff resided at *Frome*, in *Somersetshire*, out of the jurisdiction of the court of requests next mentioned, and the defendant at *Bradford*, in *Wiltshire*, within that jurisdiction. The work was done by plaintiff at *Frome;* his witnesses, who were his work-

By the *Bradford, Melksham*, &c. court of requests acts, 3 *G.* 3. c. 19. (local) and 47 *G.* 3. sess. 2. c. xxxix. any debt or debts owing or due to or *claimed or demanded* by any person, whether resident within the jurisdiction of the court or not, and for which debt or debts he should *demand* any sum not exceeding 5*l.* from any person residing or living within the jurisdiction, are to be sued for in that court. The latter act extended the local limits of the jurisdiction, and increased its amount from 40*s.* to 5*l.*, providing that a plaintiff suing in any other court for a debt recoverable under that act should not be entitled to costs, notwithstanding a verdict in his favour.

The plaintiff sued in the Exchequer for 5*l.* 10*s.* for work and labour, and after conflicting evidence had a verdict for 4*l.* 10*s.* against a defendant resident within the above jurisdiction:—Held, that the word "demand" must be intended to be "rightful demand," and that the amount recovered by verdict in the superior court being in general the standard by which the jurisdiction of a court of requests, otherwise capable of the cause, is to be decided, a suggestion should be entered to deprive the plaintiff of his costs, notwithstanding the plaintiff might have been unable to compel the attendance before the local court of witnesses resident out of the jurisdiction: no fact that the plaintiff's case had miscarried from that circumstance being stated.

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men, resided there. The action was for work and labour and materials found, and particulars of plaintiff's demand were delivered, amounting to 5*l.* 10*s.* 9*d.* The defendant delivered particulars of set-off for 3*l.* 17*s.* for a stove sold and work and labour. At the trial before *Gaselee* J. at the *Somersetshire* Lent assizes, two witnesses swore the plaintiff's charge of 5*l.* 10*s.* 9*d.* was reasonable; but there was conflicting evidence on the set-off, and the plaintiff had a verdict for 4*l.* 10*s.*, the defendant being at liberty to take back the stove. By 3*G.* 3. c. 19. (local) intituled, "An Act for the more easy and speedy Recovery of Small Debts within the Hundreds of *Bradford*, *Melksham*, and *Whorlsdown*, in the County of *Wilts*," a court of requests was erected for the recovery by any person soever of debts not exceeding the sum of 40*s.* due to the plaintiff by or from any other person or persons soever inhabiting or residing within the hundreds aforesaid, or any part thereof, or trading and dealing or seeking a livelihood therein; and it was enacted, by section 24, that no action for any *debt not amounting to* 40*s.* [afterwards by 47 *G.* 3. sess. 2. c. XXXIX. increased to 5*l.*] and recoverable by virtue of the first-mentioned act in the said court of requests, should be brought against any person or persons residing or inhabiting within the jurisdiction thereof, in any court at *Westminster*, or other court soever, or elsewhere out of the said court of requests; and that if any such action should be brought, and it should appear to the judge of the court where it was brought that the debt to be recovered did not amount to 40*s.*, and the defendant should prove by sufficient testimony, to be allowed by such judge, that at the time of commencing such action the defendant was liable to be summoned before the said court of requests for such debt, then such judge should not allow the plaintiff any costs, but should award that the plaintiff should pay the defend-

ant his costs of defending the action so commenced. The act 47 *G.* 3. sess. 2. c. XXXIX. entitled, "an act to amend 3 *G.* 3." &c., by section 1, extended the limits of the jurisdiction of this court of requests to several places in *Wiltshire*, enabling, by sect. 14, the commissioners to determine all differences and disputes between party and party for any sum not exceeding 5*l.*, in all actions of debt and assumpsit, account stated, quantum meruit, &c.; and enabling, by sect. 18, any person, whether residing within the jurisdiction of the court or not, having any such debt as thereinbefore specified or mentioned, or any debt or debts owing or due to, *or claimed or demanded* by such person, &c., and for which debt or debts he should *demand* any sum not exceeding 5*l.* from any person soever inhabiting, residing, or living within the said several hundreds, parishes, &c., or keeping or using any house, warehouse, wharf, quay, lodging, shop, shed, stall, stand, or other place of dealing or working, or using or frequenting the markets there, or seeking a livelihood, or in any way trading or dealing within the same, to cause such debtor to be summoned to appear before the said court, subject to the same provisions as in the former act; and the court should and might order the payment of any such debts. Sec. 20 enacted, "that no evidence shall be permitted to be given by the plaintiff on the trial of any such cause or action as aforesaid, of any cause of action, except such as is stated in the said summons hereby directed to be given; nor shall any evidence be admitted on behalf of the defendant on the trial of such cause or action, of any demand he may have on the plaintiff in the nature of set-off, to lessen or discharge himself from such demand, unless notice thereof in writing has been given to the said plaintiff by personal service, or by leaving it at his dwelling-house, &c. previous to the day of hearing."

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Sec. 31 enacted, "that if any action for any debt recoverable under this act in the said court shall be commenced in any other court soever, the plaintiff shall not, by reason of any verdict for him, have or be entitled to any costs soever; and if the verdict shall be given for the defendant, and the judge shall certify that such debt ought to have been recovered in the said court of requests, then the defendant shall have double costs, with all legal remedies for recovering the same."

In *Easter* term *Coleridge* Serjt. obtained a rule to enter a suggestion on the roll to deprive the plaintiff of his costs, pursuant to 47 *G.* 3. sess. 2. c. XXXIX. s. 31. He mentioned the distinction stated in *Lawson* v. *Maggridge* (*a*), that when it is intended to call on the other party to pay costs it is necessary to enter a suggestion, but that where the intent is to exonerate the party applying, and the other party is not entitled to costs, a motion (*e.g.* to review taxation or set aside the judgment as to the costs) is sufficient to take them from him. But the rule was granted as above, *Bayley* B. saying, that the entry of a suggestion was the best course, though the act might not contain any directions to that effect. An affidavit was produced that defendant, at the time of contracting the debt and of commencing the action, resided at *Bradford*, and was liable to be summoned before the said court of requests for the said debt.

*Bompas* Serjt. and *Erle* showed cause in this term. It will be said that by this, as by the *Bath* act (*b*), a plaintiff, wheresoever resident, is bound to know that the defendant's residence, however recently adopted,

(*a*) 1 Taunt. 396, *Best* Serjt. arguendo; Tidd, 9th ed. 961. See also *Foote* v. *Coore*, 2 B. & P. 588.

(*b*) See *Graham* v. *Brown*, *ante*, 309.

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gave to this local tribunal exclusive jurisdiction over the demand, whether not exceeding 5*l.* originally, or in the event reduced to that amount from a larger sum by the verdict of a jury. These acts therefore should be strictly construed, and here sect. 18 & 31 of 47 *G.* 3. by enacting that a plaintiff having a debt *claimed* or *demanded* by him, and for which he *demands* a sum not exceeding 5*l.* shall sue in the local court, at the peril of losing the costs of his action in any other court, recognize the distinction between demands of not exceeding 5*l.*, and demands by a plaintiff originally made for a larger sum, but reduced to less by the verdict of a jury. The 5*l.* jurisdiction is to be measured by the sum in contest between the parties, and not the ultimate amount recovered. The terms of this act differ from those of the *London* act 39 & 40 *G.* 3. c. CIV. sections 2. 5. which only mention "debts." Here the disallowance by the jury of 1*l.*, part of the plaintiff's claim, was owing to conflicting evidence on that item, and not to any proof of a set-off. In *Harsant* v. *Larkin* (*a*), *Dallas* C.J. rested his judgment on the point put thirdly by him as arising on the facts of that case, viz. where there is a demand for measured work and labour, and in which it may have been a fair question for a jury to decide what is due. He says, "it seems that in such a case the jury may, without any imputation on the fairness of the plaintiff's proceedings, find less to be due than the sum actually demanded; and with a view to the decision on a motion like the present, it must always be a question whether or not the plaintiff had reasonable and probable cause to litigate such a demand." He then mentions Lord *Ellenborough*'s judgment in *Horn* v. *Hughes* (*b*), that it was unnecessary to state what the court might have there thought, if it

(*a*) 3 Br. & B. 257. (*b*) 8 East, 347.

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had appeared that the plaintiff had a reasonable ground for suing for more than 5*l.*; but that from the absence of a witness, or other cause, without his default, he had failed in proving his whole demand. And the court seeing that the jury, by estimating the plaintiff's work at a lower value than the surveyor employed by both parties, had reduced the sum to be recovered below the 5*l.* recoverable in the court of requests, refused to enter the suggestion. *Shaddick* v. *Bennett* (*a*) is distinguishable. The plaintiffs there went for 26*l.*. and, to take the case out of the statute of limitations, proved a letter, written by the defendant within the six years, admitting 3*l.* to be due. The verdict being for 3*l.* only, it followed that the demand as to 23*l.* was barred by the statute, and that the plaintiff came before the court, and did not prove bonâ fide that he had established his claim for a "debt" exceeding 5*l.*

The court will construe these acts closely, for plaintiff cannot compel attendance of his witnesses, if, as here, they are resident out of the jurisdiction; for 3 *G.* 3. only gives power to summon witnesses residing "within the hundreds aforesaid," and 47 *G.* 3. has no clause on the subject. The ousting the jurisdiction of the superior courts would therefore tend to a failure of justice any where. Now where a franchise cannot give a remedy, and there would be a failure of justice, it shall not have conusance, though the action accrued within its jurisdiction, *Bac. Abr. Courts*, (D. 3.) (*b*). For here the court of requests could not enforce the plaintiff's claim, it being above 5*l.*.

*Jeremy* in support of the rule. The sum recovered by verdict is to be considered the debt for which this

(*a*) 4 B. & Cr. 769.

(*b*) He also cited *Mostyn* v. *Fabrigas*, Cowp. 172; *Rex* v. *Johnson*, 6 East, 599; *Davis* v. *Stringer*, Carth. 354.

action is brought: *Younger* v. *Wilsby* (*a*), *Shaddick* v. *Bennett* (*b*), and the various acts creating courts of requests being in *pari materiâ*, should receive the same construction. He was then stopped by the court.

Lord LYNDHURST C. B.—I am of opinion that this rule must be made absolute. The last point as to the hardship imposed by this and similar acts on plaintiffs, who are resident at a distance from the local court, or who can only substantiate their claim by witnesses residing out of its jurisdiction, but on that account cannot compel their attendance, was disposed of by this court, when lately pressed on it in *Graham* v. *Brown* (*c*). In that case the plaintiff and his witnesses resided in *London*, out of the jurisdiction of the court of requests for *Bath*, within which the defendant lived. And though we were at first inclined to admit the force of the argument then addressed to the discretion of the court, and to consider the entering a suggestion as tending to defeat the ends of justice, yet we considered ourselves bound to hold the contrary, by the express words of the act there relied on. In *Baildon* v. *Pitter* (*d*), then cited to us, the court of King's Bench, after hearing a similar argument, had, in like manner, held themselves concluded by those words, and considered themselves as not warranted in limiting their operation. The words in the present act are not dissimilar, and must receive a like construction.

As to the other point, if after a verdict for less than 5*l*. it might still be canvassed whether the plaintiff had

(*a*) 2 Marsh, 145; 6 Taunt. 452.

(*b*) 4 B. & Cr. 769; see also *Tucker* v. *Crosby*, 2 Taunt. 169; *Fleming* v. *Davis*, 5 D. & R. 371; *Bateman* v. *Smith*, 14 East, 301; and *Porter* v. *Philpot*, id. 343; *Spencer* v. *Holloway*, 15 East, 647.

(*c*) *Ante*, 309.

(*d*) 3 B. & Ald. 210.

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reasonable or probable cause to claim more than 5*l.* when this action was commenced, that would involve a second investigation in all like cases where less than 5*l.* had been recovered (*a*). But the question is, whether the plaintiff's demand was recoverable in this court of requests? It was said that it was originally above 5*l.*, though reduced below that sum by the verdict, and that therefore the plaintiff was not deprived of his costs; the words of the act being, that any person having a debt due to, or claimed or demanded by him, and for which he should *demand* any sum *not exceeding* 5*l.*, shall sue in the local court, and that if he shall sue in any other court, for any debt so recoverable, he shall not, by reason of any verdict for him, have or be entitled to any costs. However, I think that the fair construction of the word "demand" is "rightful" demand, and upon that point the jury have decided that the plaintiff had no such demand for more than 4*l.* 10*s.* It is not necessary here to say that in every case the verdict shall rule as to the amount of the debt due to the plaintiff, or which might have been rightfully demanded by him, but there is no doubt that in the generality of cases it should decide the question (*b*). A case may occur in which the circumstances alluded to in *Horn* v. *Hughes*, by Lord *Ellenborough*, may be proved to exist, but the instances there put by him of a plaintiff's miscarriage from the absence of a material witness differs materially from this case, in which, after a conflict of evidence, the jury have found that the plaintiff's demand did not amount to 5*l.* Their verdict having ascertained the amount of the demand, should not be disturbed.

(*a*) See per *Dallas* C. J. 3 Br. & B. 263. That course is expressly directed by 43 G. 3. c. 46. s. 3. in motions to deprive plaintiffs of costs where arrest has taken place for more than the sum recovered.

(*b*) *Shaddick* v. *Bennett*, 4 B. & Cr. and other cases, *ante*, 509, n. (*b*).

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BAYLEY B.—These acts may operate hardly on a plaintiff by depriving him of his right to sue in a superior court (*a*), where his witnesses do not reside within the only ambit in which the court of requests to which he must resort has power to direct their attendance. However, the cases of *Graham* v. *Brown*, and *Baildon* v. *Pitter*, satisfy me that our decision must be the same on words similar to those considered in those cases. Now, *primâ facie*, a verdict is to be taken as evidence of what was the debt existing between the parties when the action was commenced; and I agree with my Lord Chief Baron, that "demand," as found in this act, means "rightful" demand, so that here the amount of the demand ascertained by the jury to have been rightfully due from the defendant to the plaintiff is less than 5*l*. Then if the court could exercise a discretion in ordinary cases of this kind, I do not consider this to be such a case. To whatever extent the court of Common Pleas went in *Harsant* v. *Larkin*, there was one point in that case relied on by *Richardson* J. in his judgment, in which it differed from the other cases, viz. that the 13th section of the Rochester act, then in discussion, excluded the jurisdiction of the court of requests over any debt which shall not be for the payment of a sum certain, or any debt for any sum "being the balance of an account on demand originally exceeding 5*l*."(*b*) Now in that case, as well as *Horn* v. *Hughes* (*c*), the sums originally due to the respective plaintiffs were above the sums recoverable in the local courts, and had been reduced below that sum by part payments by the defendant on account.

(*a*) See 1 Siderfin, 309; Roll. Abridg. Prohibition (K. 4).

(*b*) See 3 Brod. & Bing. 260, 265; and per *Hullock* B. *Oakes* v. *Albin*, M'Lelland's Rep. 391.

(*c*) 8 East, 346.

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BOLLAND B.—Our decision in this case will not overturn *Harsant* v. *Larkin*, which proceeded on very peculiar circumstances. The parties there agreed to an estimate being taken by a surveyor appointed by them, and the plaintiff sued in the Common Pleas for a balance of 9*l.* 7*s.* 1*d.* due to him on valuation, after allowing for payments by the defendant on account. But the jury most unaccountably reduced the value of the work below the surveyor's estimate, and left the plaintiff only 1*l.* 2*s.* for his damages, instead of the balance sued for.

GURNEY B. concurred.

Rule absolute to enter a suggestion.

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The ATTORNEY GENERAL, on relation of CRUPPER and Others, *against* MALIN and Others.

A solicitor admitted and enrolled in the court of chancery may conduct a suit in the court of equity in the exchequer chamber, in the name of a clerk in the king's remembrancer's office in that court, and is entitled to costs on taxation, though he is not admitted a solicitor in that court of equity.

A Solicitor, duly admitted as such in the court of chancery, and duly certificated, was retained by the relators to file an information in the office of the king's remembrancer of this court, being the equity side of the court, in order to found a scheme for the future government of a charitable foundation.—A clerk in court, duly admitted in that office, was employed by him for the relators therein, and carried on the proceedings in the information, according to the usual practice. An order was made on the defendants to pay the relators their costs on taking the answer off the file, and the master taxed them as between party and party, including the solicitor's fees as

well as those of the clerk in court, which were charged in gross, and afterwards divided by the solicitor and clerk in court. A motion was made before the Lord Chief Baron sitting alone in equity, that the order should be referred back to the master to review his taxation, and that he should strike out all the costs payable to the solicitor for the relators, and only allow such costs as had been paid to the clerk in court, on the ground that the solicitor not being admitted as such on the equity side, could not practise there. The affidavits used against the motion stated, that the solicitor had been informed by the officers of the king's remembrancer's office, that in practice his admission was wholly unnecessary to enable him to practise there by his clerk in court, or to receive allowance of such fees as might become due to him as solicitor, besides those of the clerk in court; and several experienced solicitors deposed to the same effect. He also deposed, that the relators had advanced him sums from time to time during the progress of the suit, on general account, exceeding the taxed costs, and that the costs decreed were therefore due to the relators. It also appeared that there is a roll of admissions of solicitors of the office of king's remembrancer kept there, beginning 1729, containing in that year forty-six admissions; in 1730 about 1360; (2 *Geo.* 2. c. 23. having then passed); from 1731 to 1793 about 100; in 1794 near 700; and from 1795 to 1832 about 20. No such roll is kept in the office of the treasurer's remembrancer, or the pipe office. A limited number of attornies are admitted in those offices, viz. five in the former and eight in the latter; and the admissions take place after serving a five-years' clerkship to an attorney or officer in those offices, and only on deaths or other vacancies. Attornies and solicitors of other courts practise there when necessary, in the name of an admitted attorney or officer.

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The Lord Chief Baron having suggested that the question should be discussed before the whole court (*a*), the parties consented, and it was now argued by

*Boteler* and *Wakefield* in support of the motion. This solicitor is not entitled to his costs. By *2 Geo. 2.* c. *23.* s. 1. no person shall be admitted to act as an attorney, or to carry on proceedings in the name of any person in any court of record in *England*, wherein attornies have been accustomably admitted and sworn, except he be sworn, admitted, and enrolled in such of the said courts where he shall act as attorney according to that act; and by sect. *2*, the judges are to examine into his capacity and fitness to act as an attorney, before his swearing and admission. By s. *3*, no person shall act as a solicitor, or carry on, solicit, or defend any suit or proceedings in the name of any other person in any court of equity, (mentioning, among others, the court of equity in the exchequer chamber,) unless he shall take the oath appointed by the act to be taken by solicitors in courts of equity. By s. 18, the different officers of the courts of equity there mentioned, (among others) the king's remembrancer of the court of exchequer, or his deputy, shall from time to time enrol the name of every person admitted a solicitor in the said respective courts of equity. By s. *24*, a person who in his own name or that of another commences, &c. proceedings as an attorney or solicitor in any court of law or equity aforesaid, without being admitted and enrolled as aforesaid, shall forfeit *50l.* Section *27* only exempts the known attornies and clerks of the different offices in the court of exchequer from the operation of the act, so that they may be admitted and practise in that court, or may practise in other courts of record, in the name and with the consent in writing of some sworn attorney

(*a*) See 4 Inst. 109. 118. and 57 *G.* 3. c. 18.

of such court, in like manner as they had usually been and might have done before that act. Nor do the latter words of the section authorize practice in the equity court in the exchequer chamber by any but persons admitted solicitors there, though under those words they may "practise and solicit in the said respective offices"(*a*).

The office of the king's remembrancer is not a convertible term with the court of equity in the exchequer chamber. That court is pointed at by the words of s. 27, which speak of an attorney or solicitor admitted in any of the several courts before mentioned, as competent to practise and solicit in the offices enumerated in that section. A considerable part of the business of the king's remembrancer's office being in matters of revenue, and official as well as judicial (*b*), the expression in section 27, offices in the court of exchequer, should be read with reference to the official business

(*a*) 2 *G.* 2. c. 23. s. 27. which enacts, "That nothing in this act contained shall extend or be construed to extend to the examination, swearing, admission or inrolment of the attornies or clerks of the offices of the king's remembrancer, treasurer's remembrancer, pipe, or office of pleas in the court of Exchequer at *Westminster*, for the time being; but that the said attornies and clerks of the said respective offices shall and may be approved, sworn, admitted and practice in the said court of Exchequer, or may practice in any other of the courts of record before mentioned, in the name and with the consent of some sworn attorney of such court; such consent to be in writing, and signed by such attorney as aforesaid, in like manner as they usually have been and might have done before the making of this act, any thing herein contained to the contrary in any wise notwithstanding; and that it shall and may be lawful, from and after the said 1st day of *December* 1730, for any person who shall be sworn, admitted, and inrolled an attorney or solicitor in any of the several courts before mentioned, according to the direction of this act, to practise and solicit in the said respective offices, in the same manner as heretofore has been done; any thing hereinbefore contained, or any law or statute to the contrary notwithstanding."

(*b*) The business on the revenue and equity sides of the king's remembrancer's office is executed by the same persons.

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there, in order not to repeal the preceding sections, particularly s. 18, which mentions "remembrancer of the *court* of exchequer."

[*Bayley* B. By sect. 27, the office of pleas in the court of exchequer is put on the same footing with the office of the king's remembrancer. Now what business merely official, or only relating to revenue, is done there? It is clear from s. 11, that no attorney of another court was entitled to practise on the plea side; for before 11 *Geo.* 4. and 1 *Will.* 4. c. 70. only four sworn attornies were admitted there.]

The cases are conflicting. In *Meddowcroft* v. *Holbrook* (*a*) it was held on s. 24, that a solicitor admitted in chancery may practise on the equity side of the exchequer, without being admitted a solicitor of the latter court. But *Vincent* v. *Holt* (*b*) overruled the principle of that case, for it decided that a solicitor admitted on the equity side of the exchequer, is not therefore entitled to practise in chancery without being admitted there.

The advances made to this solicitor were general, and not specifically in this case, which distinguishes it from *Reader* v. *Bloom* (*c*), which may be cited in support of the affidavit that these costs belong to the relators and not to the solicitor. Only the costs paid by the solicitor to the clerk in court should be allowed; *Prebble* v. *Boghurst* (*d*). *Burton*'s Practice, preface; 1 *Fowler*'s Practice, 14, 2d vol. 386; *Edmunds*' Practice, 2, were also cited.

*Stephen* Serjt. *G. Richards*, *Busby*, and *Mansel* against the motion. The master was right in allowing the costs of a solicitor of the court of chancery, who

(*a*) 1 H. Bla. 50.
(*b*) 4 Taunt. 452.
(*c*) 3 Bing. 9.
(*d*) 2 Simon's R. 246.

practised by his clerk in court in the court of equity in the exchequer chamber, popularly called the equity side of this court. It is incontestible that by the practice, from the earliest time at which it can be ascertained, till the passing of 1 *Will.* 4, c. 70. all business was carried on in the names of sworn attornies on the plea side, and of sworn clerks in court on the equity side of this court; see 2 *Manning*'s Practice, 1st ed. 195, containing the rules of 1654; *Vin. Abr.* tit. Attorney (K 2); *Thursby* v. *Warren* (*a*), *Keilway*'s *case* (*b*). Those were the only officers of whom either court took cognizance, and accordingly the practitioners of other courts acted as intermediate men between them and their own clients the suitors. No warrant of attorney from the suitor to the sworn attorney or clerk in court was required, and the taxing officers made no distinction between attorney and sworn attorney, or solicitor and clerk in court, but treated them as constituting the same persons, their division of the costs recovered being arranged between themselves. The prohibitory clauses, s. 7 and 24, prevented persons not solicitors from having access to the clerks in court on the equity side. There can therefore be no difference *quoad hoc* between business done in the office, and that done in court. Now what was true of the office of pleas in the court of exchequer, as mentioned in 2 *Geo.* 2. c. 23. s. 27. is also true as to the court of equity in the exchequer chamber. The office of the king's remembrancer is, strictly speaking, the office of the king's remembrancer in the court of equity in the exchequer chamber. For as no case can be shown where an attorney of another court could practice on the plea side so as to claim a share of the costs, except under that section, then as its words apply equally to the equity side, this solicitor may claim the proportion of fees earned in the latter court. Such uncertain reasons may have operated at various

(*a*) Cro. Car. 159. (*b*) March's Rep. 78.

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times on the practice of admission that little is to be deduced from their variation in number. Taking the judgment in *Meddowcroft* v. *Holbrook*, whether well or ill reported, as resting on the prohibitory clauses sect. 7 and 24, sect. 27 was not intended to take this case out of them, because there being a monopoly of practice on the law side, which had no roll of admissions and only four attornies, and on the equity side also, which had a roll for solicitors, but only a limited number of clerks in court, the legislature thought fit to provide that practisers of other courts might practise in their names in either court. For the admission which might be procured in C. P. by an attorney of K. B., and vice versâ, could not be obtained among the sworn attornies on the plea side, nor among the clerks in court on the equity side. Now by s. 27, the attornies on the law side were authorized to act for other attornies, and to divide the profits with them. Nor does s. 27 nullify s. 7 and 24, but leaves them sufficient operation; and by no means admits persons to practise who are not admitted solicitors in other courts. This question rests on sect. 27 as a saving clause, not on the prohibitory sections 7 and 24, on which *Meddowcroft* v. *Holbrook* is said to have proceeded. Assuming however that that case was decided on s. 24 as applying to persons admitted &c. since the act, and as therefore being manifestly distinct from s. 3 and 7, it seems right; for Lord *Loughborough* might have observed that in s. 24, which inflicts a penalty on any person acting as an attorney or solicitor in his own or another's name "without being admitted or enrolled *as aforesaid*," the words subjoined to "enrolled" in s. 1 and 3, viz. "in such of the said courts where he shall act as an attorney or solicitor," were studiously omitted. The saving in s. 27 was only required by judicial business; then business merely official was not contemplated, nor do any words in the act limit its powers to revenue.

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Lord LYNDHURST C. B.—This is a question of importance to persons admitted solicitors in the court of chancery, who have practised in the court of equity in the exchequer chamber, without being admitted as solicitors in that court. When it came before me at the equity sittings at *Gray's Inn Hall*, on exceptions to the master's report, I felt governed by *Vincent* v. *Holt*; but my attention being afterwards addressed to s. 27 of 2 *Geo.* 2. c. 23. I had so much doubt on the construction of the act that I suggested the propriety of taking the opinion of the whole court upon it. It has now been argued before us with considerable learning, and after elaborate researches on both sides. Looking at the act of 2 *Geo.* 2. c. 23. independently of the 27th section, I entertain considerable doubts whether the decision of Lord *Loughborough* in *Meddowcroft* v. *Holbrook* was not correct. The clauses relating to the admission and enrolment of *attornies* are the same as those relating to the same requisites of *solicitors* (*a*); but in section 10 it is in terms provided, that an attorney (sworn, admitted, and enrolled,) as such, in any of the superior courts of common law at *Westminster*, *Wales*, or the counties palatine, may, by consent in writing of another attorney in any of the said other courts, practise in the name of that other. It seems to me that by the wording of the original clauses (*b*) the legislature did not consider themselves as precluding a solicitor of one court of equity from practising in another like court, with the consent of a solicitor of the latter court. If that be so, the sections 5 and 7 being similar, and it not being necessary that there should be another clause for solicitors like sec. 10, because solicitors do not practise in their own names, but in those of the clerks in court

(*a*) See sections 5 and 7.

(*b*) It appeared to be the impression of the court that section 27 had not formed part of the bill as originally brought in, but had been added in the progress of the bill through parliament.

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of the court of equity; it does not seem to follow that a solicitor admitted and enrolled in one court of equity should be precluded from practising in another court of similar jurisdiction, in the name of another solicitor of the latter court.

One difficulty arises out of sect. 21; viz. the privilege given to a solicitor admitted and enrolled in one court of equity to be admitted and enrolled as such in another, without paying fees(*a*). It seems that no advantage would be conferred on the solicitor if Lord *Loughborough*'s construction of the act is adhered to: for if he could practise here in the name of a clerk in court, he could obtain no benefit by being admitted in the court of equity here; and the section applies to many other courts of equity, of which we are little informed. It is not necessary to decide on that; we are more called on to decide on *Meddowcroft* v. *Holbrook*, and the subsequent case in the Common Pleas of *Vincent* v. *Holt*. I say it is unnecessary to decide the general question, for many regulations in the act apply to the exchequer; and the legislature had this court in view in the framing it. Thus by s. 11. no more attornies were to be admitted in any court than have been accustomed to be admitted therein; and under that provision four sworn attornies only existed in this court till the passing of the statute 11 *Geo.* 4. and 1 *Will.* 4. c. 70. Again, in sect. 18 of 2 *Geo.* 2. c. 23. it is provided that there shall be a roll for *attornies* in the various courts of law there mentioned; and there is a similar provision as to *solicitors* admitted in the court of exchequer, but not for attornies of that court. A subsequent section (sect. 27) provides for the enrolment of the attornies or clerks of the offices in exchequer therein mentioned, according to the ancient custom therein. This brings me to section 27 (his lordship stated it, see 515, note). That section therefore

(*a*) See 23 G. 2. c. 26. s. 15.

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is not to apply to attornies or clerks of certain offices, viz. among others, of the king's remembrancer. What are the officers of the king's remembrancer? They are the sworn and side clerks, who execute the equity and revenue business. Now these persons are not admitted and enrolled according to *2 Geo. 2. c. 23.* but in the manner accustomed before that act. How then were the attornies or clerks of "the office of pleas of the court of exchequer" (that is, the four sworn attornies,) admitted and enrolled? Not under this act, but according to the former custom prevailing in this court before 11 *G. 4.* and 1 *W. 4. c. 70.* The *2 G. 2. c. 23. s. 27.* next provides that these attornies and clerks may practise in other courts in the names and with the consent in writing of attornies of such other courts. Then the concluding words of the section are material expressions in this case; viz. that it shall be lawful, from and after 1 *December* 1730, for any person who shall be sworn, admitted, and enrolled an attorney or solicitor in any of the several courts before mentioned, according to the direction of this act, to practise and solicit in the said *respective offices* in the same manner as heretofore has been done, any *thing hereinbefore contained*, or any law or statute to the contrary notwithstanding. In what offices? In the office of pleas, and in the office of the king's remembrancer. We know that attornies of other courts practised in the office of pleas, in the names of the attornies of the court, to the fullest extent, viz. up to the termination of the causes by final judgment, and not in the limited manner contended for in support of the motion. That then is the construction put on this section by practice, nor is any thing produced to the contrary. Next, what has been the usage in the king's remembrancer's office? The equity and revenue business is conducted there by the same persons, and many attornies practise in the name of a sworn clerk in

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court; not merely in the limited manner I have alluded to, but up to the period of the decree. This case then is specially provided for in the exchequer; and a solicitor admitted in the court of chancery, may, in the name of a sworn clerk of the court of equity in the exchequer chamber, carry on a suit to its final termination, without enrolment or admission in the latter court. Such has been the constant usage; and our decision is warranted as well by the act of 2 *G.* 2. as by the custom which has prevailed since that reign. Nothing then will be taken by this motion. But though it may be usual that the party failing in an exception to the master's report shall pay the costs of that proceeding, still as there was so much doubt that I directed a second argument, and as my first opinion was adverse to that now entertained by the court on sec. 27, they will not be granted in this case.

The other barons concurred.—*Bayley* B. added, I do not differ from the lord chief baron on the general construction of the act of 2 *G.* 2, but I think section 27 sufficient to found our decision. I think that that section did not apply merely to the business in the king's remembrancer's office, but to general business done by the solicitor in the cause, and that the power to practise in any of the offices mentioned in the act is not to be divided or varied in its application to business not official, and business merely official. The whole bill of costs appears to me one entire matter.

Motion refused without costs.

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## The ATTORNEY-GENERAL *against* RIDDELL.

AN information had been filed against the defendant, an entered paper-maker, containing several counts. The first count was framed on 1 *G.* 4. c. 58. s. 6. to recover a penalty for selling, sending out and delivering paper without being tied up and labelled. Another count was on 1 *G.* 4. c. 58. s. 7. for a penalty in respect of a quantity of paper removed from his manufactory without its being inclosed in a wrapper so labelled, and with such impressions of a departure stamp thereon as required by 1 *G.* 4. c. 58. ss. 6 and 7. At the trial before the *Lord Chief Baron* at the revenue sittings after last *Michaelmas* term, it appeared that on the day laid in the information the wife of the defendant went with her brother-in-law in a cart to the shop of *Shering*, a grocer at *Halstead*. The man went in, and in her name solicited a loan of 5*l.* to make up 50*l.* then due from her husband, the defendant, for paper duty; adding, that she would deposit with him paper worth 6*l.* which was then in the cart. On *Shering* coming to her in the cart she repeated the same thing to him, saying, if the money was not forthcoming he might keep the paper. The bundle of paper had no wrapper or label, and therefore no departure or duty stamp on it, both those stamps being on the label put on by the officer on charging the duty. *Shering* took it and gave her a cheque for 5*l.*, for which she got cash, and on the same day paid 5*l.* for paper duty due, 45*l.* having been paid before. Her brother-in-law was in the house with her when she paid the duty. The money never having been repaid, *Shering* kept the paper, and it was

A wife possessed authority from her husband, a paper-maker, to give in his absence certain requisite excise notices and receipts, without which paper could not legally be removed from the mill, though the making it might continue. She had also paid excise duty by his authority. But it did not appear that she had any other authority from him respecting the manufacture, or to remove paper at all. She afterwards removed paper in an illegal manner and pledged it, stating that she wished to make up a sum to pay duty with. The husband having been proceeded against for such removal: Held, that her former acts were evidence to be left to the jury to decide whether or not the illegal act was done by his authority.

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seized on his premises. The supervisor who seized it proved that the defendant was an entered paper-maker, and that he had surveyed the mill once a fortnight for three years. He said that the excise officer, on receiving notice from the paper-maker to attend to weigh and charge the duty under 34 *G.* 3. c. 20. s. 7. takes the stamp denoting the charge of duty in order to apply it to part of the label fixed on the top of the wrapper. 1 *Geo.* 4. c. 58. s. 6. Before sending out paper from the stock the maker is bound to tie it up and to affix an impression of another stamp called a departure stamp on that part of the label fixed to the side of the wrapper, in order to denote the time of its leaving the maker's possession, (id. s. 9.). In the absence of the defendant the witness had generally seen the wife or the foreman, and on those occasions if he inquired of her whether there was any notice, *i. e.* of weighing and charging paper with duty, she would sometimes write one and give it him; but on his putting a similar question to the foreman he would give no answer, but would offer to go and ask her if there was. He had seen her pay paper duty to the collector more than once.

The paper was produced in the same state as when seized. The witness saw the defendant some time after the seizure and asked him "whether he allowed his wife to transact business for him in his absence, such as giving notices and the like," and he said, I do. The witness had never known her give directions as to the mode of carrying on the business, or do any thing except giving the notices to charge if her husband was absent. Another officer whose duty it was to attend the weighing of paper proved that the defendant, when at home, always gave the requisite notices, but was often absent from home, on which occasions his wife gave the notices which it was his duty to give, but did not interfere with the work carrying on. Eighteen of

the notices to the excise of weighing and charging paper with duty, which by 34 *G.* 3. c. 20. s. 7. are required to be given by the maker of paper, were produced in her writing. *e.g.* "Notice to charge paper, *May* 29, 1830, at 10 in the morning. (Signed) *Ann*, for *William Riddell.*" Fourteen receipts for labels, which by 1 *G.* 4. c. 58. s. 6. are required to be signed by the maker, his foreman or servant, were produced, signed by her, and the following account, which by 1 *G.* 4. c. 58. s. 14. is to be signed by the maker or his foreman, and was delivered by her to the surveyor:—"Sent out since last survey two reams first class, No. 6061. (Signed) *Ann*, for *William Riddell. May* 30, 1830."

*Follett* for the defendant, objected that the extent of the evidence given only amounted to show a limited authority to the wife, in the defendant's absence, to give such notices to the excise as were requisite to keep the manufacture from being stopped, but that nothing appeared to show her acting generally in the making paper, or sending it out, or to have any general authority from the defendant to do any such acts. He also urged, that payment of duty by the wife was not a part of the trade but a consequence of it, and gave her no controul over or power to take away paper; that there was no evidence of her having paid the deficient duty with the *5l.* she raised by the pledge of the paper, and therefore that nothing fixed the husband with any actual or constructive knowledge of the illegal act charged; that in *Attorney-General* v. *Siddon* (*a*) the master had himself been guilty of harbouring smuggled goods, and for the concealment of which, in his absence, the servant, on the exigency of the moment, acted illegally; so that there the act of the servant was not the only evidence against the master.

(*a*) Vol. I. 41.

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The *Chief Baron* assented that there was not evidence sufficient to go to the jury to shew that the wife was authorised by her husband to convey away the paper as charged; and that the authority given by him to her giving notices, receipts, &c. appeared limited solely to those acts. The defendant had a verdict.

In *Hilary* term a rule nisi for a new trial was obtained, on the ground that there was evidence for a jury that the defendant authorized the act of the wife as his agent.

*Follett* showed cause in *Easter* term. The question is important, whether an illegal act of a wife can be given in evidence to fix her husband with the consequences. The connection between them will not suffice, without showing that she was his agent so entrusted with the management of his business, that any thing done by her would be evidence against him. Now the only authority proved was of a limited kind, and had it been to act generally in the business, the defendant could not be presumed to have sanctioned a direct breach of excise laws in removing paper unlabelled. This is not strictly a criminal charge, though in the nature of it; nor does *Attorney-General* v. *Siddon* carry constructive criminality so far as here contended for.

[*Vaughan* B. The criminal act of the master in concealing smuggled tobacco was there established by the verdict on the second count, and as an extrinsic circumstance afforded the jury reasonable cause to infer a general authority from him to the servant to do any further illegal act necessary to protect the original fraud.]

The illegal act here charged was so far from necessarily benefiting the defendant, that it might have been done by the wife to shield her misapplication of money entrusted to her to pay duty. The defendant is not shown to have knowledge of her act. She certainly

did not interfere in the manufacture even in her husband's absence, and there is no evidence of any authority to act in any other way than giving the excise notices requisite to prevent the stoppage of the business.

[Lord *Lyndhurst* C. B. It did not appear to be within the scope of the wife's authority or of her ordinary duty to send paper out at all in the regular way. But if, possessing that authority, she used it irregularly, then, on the authority of the cases cited, the defendant would be answerable for her act.]

As to the first count on section 6, the question is, had the wife authority to send out paper unlabelled or at all? That section confines the penalty to the maker, and the paper itself is forfeited. In all former cases where it has been sought to fix the master with the act of the servant, it has been proved that the latter did some acts in the course of the manufacture from which the master's authority to act generally in it must be inferred.

The *Attorney-General*, *Clarke* and Sir *George Grey* supported the rule. The case falls within the principle of *Attorney-General* v. *Siddon*, where though the master knew nothing of the act of the servant, yet on the probability apparent on the evidence, that the master had authorized the servant to consummate his own original fraud, the court supported the verdict for the crown. Here the wife is a mere agent. This is not a criminal proceeding; but the cases purely criminal have gone further than is here contended for. Thus in *Rex* v. *Gutch* (*a*), the proprietor of a newspaper, though residing at a distance, and not proved to take any part in its management, or to know of the libellous publication, was held criminally responsible for the act of the managing partner, who conducted

(*a*) Mood. & Malk. 437. See per *Heath* J. *Bush* v. *Steinman*, 1 B. & P. 409.

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the paper for him. The fact that the latter was also liable to proceedings made no difference; as also appears by *Rex* v. *Almon* (*a*) and *Rex* v. *Dixon* (*b*). Where a reasonable probability is raised, that a wife, living with her husband, has as his servant done that which he as master was likely to authorize; it involves very important consequences, if the circumstances raising that probability are not left to the jury to decide whether he authorized her so to act. Now the evidence was fairly calculated to raise the inference, that the wife had a general authority from the defendant to conduct his business in all respects in his absence; and a verdict the other way would not have been disturbed. Her acts of giving excise notices, receipts, &c., were done in the course of the trade, and required acquaintance with it. Without them, though the manufacture might have proceeded, the trade must have stopped. Payment of duty by the defendant's authority is an act done in the course of the trade. Again, if she had misapplied money received for paying the duty, her replacing it, though by illegal sale of paper, benefitted the husband, who must at all events have paid it. [Lord *Lyndhurst* C. B. Does my authority to an agent to pay debts for me imply any authority to him to sell my property to do so? Here the wife could not be called as a witness to rebut the *primâ facie* case for the crown, by showing what the real authority was, as any other agent might have been (*c*).]

The question of fact remains whether there is evidence of authority, even if there is another remedy for the same offence. [*Bayley* B. Suppose the wife, without the knowledge or authority of her husband to do any thing in the concern, removed a

(*a*) 5 Burr. 2686. (*b*) 3 M. & S. 11; 4 Camp. 12, S. C.
(*c*) See *Rex* v. *Dixon*, 4 Campb. 12.

quantity of paper in an illegal manner, would not an information lie against her, in which her husband would merely be joined for conformity?] If so, the crown would not be compelled to proceed on section 7, against the husband only, as in this information. [Lord *Lyndhurst* C. B. It appears that 1 *Geo.* 4. c. 58. s. 7. inflicts a penalty, not only on the maker, but also on every person removing or concerned in the delivery, removal, or receipt of paper, not inclosed in a wrapper duly labelled. Now supposing that in consequence of a defect of evidence in showing that the wife acted within the scope of the authority given her by the husband, the illegal act should be taken to be not that of the defendant, but wholly that of the wife, would she not have been liable to be joined with the husband as a defendant under section 7? That would raise a question, whether if a feme covert unconnected with or unauthorized by her husband, the paper-maker, was assisting in the illegal act, she and her husband should not have been joined under this section(*a*)?]

By section 6, the maker only is required to do the acts of tying up and labelling; so that the question of joint liability does not arise on the first count.

*Cur. adv. vult.*

Lord LYNDHURST C. B. now delivered the judgment of the court. The ground of the motion for a new trial was the rejection of evidence which, it was contended, ought to have been received at the trial. The facts of the case were these:—The defendant was a paper manufacturer, who employed a foreman to superintend the manufacture of the paper. During the absence of the defendant his wife acted for him in one department of the business. It appeared upon the

(*a*) Com. Dig. Baron and Feme, (Y.)

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evidence, that in cases where notices were necessary for the excise officer, these notices, during the absence of the husband, were very frequently given by the wife. It does not appear that she interfered in the manufacture of the paper, but during the absence of the husband she was exclusively employed in that part of the business referred to, and so much so, that the foreman used to appeal to her to know what notices should be given. It appeared also, that on one occasion she was employed by the defendant to pay duty in arrear; and on another, that she pledged some paper from her husband's manufactory to raise the money to pay the duties (*a*). These were the general facts of the case, and under these circumstances it was proposed by the attorney-general to give certain acts of the wife in evidence, in order to fix the husband with the improper removal of paper. It was stated that some duties being in arrear, the wife had called at the house or shop of a neighbour with a quantity of paper which had been illegally removed from the manufactory, and that she was desirous of borrowing money upon the deposit of it. The money was lent, and the paper accordingly deposited, and it was stated by the attorney-general that he should prove that on the same day the duties then due were paid by the wife. That evidence was rejected, as not being evidence proper to charge the husband with the acts of the wife; but we are of opinion that it was improperly rejected, and that it ought to have been left to go to the jury to decide whether or not the act of the wife, under the circumstances stated, was done by the authority of her husband the defendant. Therefore there ought to be a new trial.

Rule absolute.

(*a*) On showing cause, it had been denied that this fact clearly appeared in evidence.

## MORGAN JONES *against* WILLIAM JONES, Gent. one, &c.

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DEBT on a joint and several bond executed by *W. Jones*, of *L.*, *A. T. Jones* (both since deceased) and defendant. Plea, non est factum. Replication, similiter to plea, and praying enrolment of the bond (bond set out), and of the condition, which was also set out, and recited to the following effect:—

Whereas by indentures of lease and release, &c. between *W. Jones*, of *L.* of the one part, and *Morgan Jones* (plaintiff) of the other part; the said *W. Jones* of *L.* in consideration of 180*l.* to him in hand paid by the said plaintiff, did grant, release, and convey unto the said plaintiff and to his heirs and assigns, all that messuage and lands, with the appurtenances, called *Rhydyprinion*, situate, &c., formerly in the seisin of *Morgan Lewis*, late of *R.* aforesaid; which said messuage and lands had been assigned over by the said *M. Lewis*, to the said *W. Jones* of *L.* under the lords' act, (32 *G.* 2. c. 28); and whereas at the time of the execution of the said indenture of release, it was agreed upon that *T. Jones* and *W. Jones*, of *A.* (defendant), should join in an obligation with the before-mentioned *W. Jones* of *L.* to indemnify the plaintiff and all other persons whomsoever, and should for that purpose enter into the before-written obligation, conditioned as hereafter mentioned, that is to say, That if the before bounden *W. Jones* of *L.* *T. Jones*, and *W. Jones* (defendant), or one of them,

Where in dower *unde nihil habet* it was suggested on the record by the demandant that her husband died seised of the tenements out of which she claimed her dower, but the jury only found that the husband had, during his intermarriage, been seised thereof in fee: Held, in an action on a bond of indemnity against any loss which the obligee (the tenant in the action of dower) might sustain by legal ouster from any part of the tenements, that damages and costs paid by him to the demandant could not be recovered.

*Semble*, if a plea of tender in dower does not contain an averment that from the death of the husband the tenant had always been ready and willing to render dower to demandant, she would not be deprived of her right to recover damages under the stat. *Merton*, 20 *Hen.* 3. c. 1. though she confessed the plea.

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their or one of their heirs, executors or administrators, should and did, from time to time and at all times thereafter, pay and reimburse unto the said plaintiff, his heirs and assigns, whatever loss or injury he or they might sustain for or by reason of the legal ouster of him the said plaintiff, his heirs or assigns, out and of the said messuage, tenement, and lands called *Rhydyprinion*, or any part thereof, by the said *Lewis*, or any other person or persons having or lawfully claiming any right to the soil or freehold thereof or any part thereof, or for or by reason of the commencement and prosecution of any suits at law or in equity; and if the said plaintiff, his heirs and assigns, shall and do, from time to time and at all times, peaceably and quietly have, hold, use, occupy, possess and enjoy the said messuages, tenements, lands, and every part thereof, with the appurtenances, without any let, suit, interruption or molestation of, from, or by the said *M. Lewis* or any person or persons whatsoever: And that free and clear, and freely and clearly acquitted, exonerated, indemnified and discharged, of and from all other titles, troubles, charges, and incumbrances whatsoever, of and from all costs, damages and expenses to be suffered or incurred by the said plaintiff, his heirs and assigns thereby: Then the before written bond was to be void, or else to remain in full force and virtue.

The two following breaches were then suggested on the roll under 8 & 9 *W.* 3. c. 11. s. 8. 1st. That after the making of the said writing obligatory, to wit, &c. A. D. 1827, a certain action of dower was commenced and prosecuted in the court of great sessions for *Cardiganshire* by one *Mary Lewis*, widow, who was the wife of the said *M. Lewis*, against the said plaintiff, for the recovery of the third part of certain messuages, tenements, and lands, as the dower which

were of the said *M. Lewis*, her former husband; and thereupon such proceedings were had, that afterwards, to wit, in the year aforesaid, the said *Mary*, by the consideration and judgment of the court, recovered against the plaintiff in the said (present) action, and thereupon had full seisin and possession given her of the said messuage, tenement, and lands in the said condition of the said writing obligatory mentioned as her dower. And the said (present) plaintiff was legally ousted out of the possession of the same. And by reason of the said judgment and legal ouster of him the said plaintiff out of the possession of the said messuage, tenement, and lands in the condition of the said writing obligatory mentioned, he hath been obliged to pay and hath paid divers sums of money, amounting, &c. to 50*l.* in satisfaction of the said dower of the said *Mary Lewis*, and hath sustained a loss or injury to a large amount, to wit, to the amount of 100*l.* Yet the said *W. Jones* (of *L.*) *T. Jones*, and *W. Jones*, of *A.* (defendant), have not, nor has either of them, nor have the heirs, executors, or administrators of any or either of them, paid and reimbursed unto the said plaintiff the said sum of money, being the loss or injury he hath sustained as aforesaid, or any part thereof, contrary to the form and effect of the said condition, &c. of the said writing obligatory. Secondly. That the costs, damages, and expenses suffered and incurred by the said plaintiff, by reason of the said action of dower so commenced and recovered by the said *Mary* against the said plaintiff, amounted in the whole to, &c. 100*l.* &c.; and the said plaintiff hath not been indemnified and discharged of and from the same, and the said *W. Jones* (of *L.*), *T. Jones*, and *W. Jones*, (of *A.* defendant), have not, nor hath either of them, paid to the said plaintiff the said last-mentioned sum of 100*l.*; and

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the said plaintiff hath not held, occupied, and enjoyed the said messuage, tenement, and lands, in the condition of the said writing obligatory mentioned, free and clear, and freely and clearly acquitted, exonerated, indemnified, and discharged of and from the said costs, damages, and expenses, amounting to 100*l*., suffered or incurred by the said plaintiff in the said action of dower so commenced and recovered by the said *Mary* against the said plaintiff as aforesaid, contrary, &c. Award of venire to try the issue joined, and if found for the plaintiff, to inquire of the truth of the breaches assigned, and assess the damages.

At the trial before *Bolland* B. at the last Lent assizes for *Carmarthenshire* (*a*), it appeared that one *M. Lewis* was in 1815 seised in fee of *Rhydyprinion*, and having been taken in execution was afterwards discharged under the lords' act, *32 G. 2. c. 28. s. 13.* and assigned his estate and effects to *William Jones* of *L.* who took possession of *Rhydyprinion*, and sold it in 1819 to the plaintiff in this action. The insolvent's son having claimed the estate, the bond of indemnity now sued on was given to the purchaser by *W. Jones* of *L.* the assignee, *T. Jones*, and *W. Jones*, (of *A.* defendant), the two latter being at that time attornies for the assignee. The insolvent, *Lewis*, died in 1825, leaving a widow surviving him on his death; who, after demanding an assignment of dower by the present plaintiff out of *Rhydyprinion*, sued him in dower *unde nihil habet* in the *Cardiganshire* great sessions. The attorney in that action was the present defendant. The tenant in dower (the present plaintiff) pleaded, that before the commencement of the suit he was ready and willing, and then and there tendered and

(*a*) The venue had been changed from *Cardiganshire*.

offered to the said (widow) her dower of the said hereditaments and premises with the appurtenances; to receive which she wholly refused: and he further said, that he is still ready and willing to render to the said (widow) her dower of the said hereditaments and premises, and rendereth the same here in court to the said (widow). Judgment was signed thereupon thus: And because the said (widow) doth not deny the plea of the said tenant (the present plaintiff), Therefore it is considered that the said (widow) recover against the said (tenant) her seisin of the third part above demanded, with the appurtenances to be held by her in severalty by metes and bounds; and the said *M. J.* the tenant, in mercy, and so forth: And thereupon the said (widow) saith, that *M. L.* her late husband, on 1 *January* 1824, *died seised of the tenements* aforesaid in his demesne as of fee, and prays a writ of &c. to be directed by the sheriff of the county of *C. as well* to give her full seisin of the third part aforesaid, with the appurtenances to be held by her in severalty by metes and bounds, *as to inquire* how much the third part of the tenements aforesaid may be yearly worth according to the value thereof, and also *what damages* the said (widow) has sustained on occasion of detaining the dower aforesaid, beyond the value aforesaid, from the commencement of this suit *until the award* of the said inquiry, as also for her costs and charges by her about her suit in this behalf expended. The writ of seisin and inquiry having issued, the inquisition found by the jury was, that the said *M. Lewis* (the deceased husband) *died* on 1 *June* 1825, at &c., having *during his intermarriage* with the said (widow) been seised in his demesne as of fee-simple of the tenements aforesaid; and the said tenements were, and ever since his decease have been of the yearly value of 9*l.* beyond all reprizes: and that nine months have elapsed *since the demand of dower*

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by the said (widow), and that the said (widow) sustained damages by reason of her dower to the amount of *2l.*, and for her costs in this suit the sum of 40*s.*: Therefore it is considered that the said (widow) recover against the said (tenant and present plaintiff) as well her damages of *2l.* sustained by reason of her detention of her said dower, as also the sum of 40*s.* for her costs by the inquisition aforesaid found. The widow was put in possession of a third part of *Rhydyprinion*.

In the present action the plaintiff had a verdict on non est factum. Damages were assessed on the first breach at *30l.* for four years and a half arrears of dower; and on the second for *29l.* 14*s.* 6*d.*, being for the damages and costs paid by plaintiff in the action of dower. The learned baron gave leave to defendant to move to reduce the verdict by the latter sum.

*E. V. Williams* moved to reduce the damages to nominal. First, no breach of the condition is shown, for under the circumstances mentioned in the recital, it was not contemplated that the obligors should guarantee the estate to be barred of dower, but merely that vendor was seised in fee. [*Bayley* B. It is on the language of the recital that we are to judge—a general covenant creates a general obligation.] Secondly, the result of the proceedings in dower, as stated in the first breach, is, that the widow was put in possession of the whole; whereas the judgment is for a third part only. [*Bayley* B. They do not describe the recovery as being of the whole "of the said messuage, &c." *i. e.* recovered, without saying what. The delivery of such seisin as is here alleged is an allegation of a matter in pais, and might take place as to the whole after a judgment for part. The word "recovered" may apply to all that for which judgment was given. The jury are to

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inquire the truth of the matter, and the averment in the breach did not make proof by the record necessary, so that a variance from it is not fatal.] Thirdly, the plaintiff in this action was not entitled to recover the costs of the action of dower, because no costs ought to have been awarded to the plaintiff in dower. It appeared by the record produced that the tenant in dower had pleaded a tender, which was confessed by the demandant, who thereupon took judgment. Therefore as the defendant in dower had committed no default, no costs were recoverable; or, at all events, no costs after the time of awarding the writ of inquisition, *Penrice*'s case (*a*): consequently this verdict must be reduced, by striking out either the whole amount of the costs of the action of dower, or the amount incurred after such award.

A rule having been granted to reduce the damages accordingly,

*John Evans* and *Whitcombe* showed cause. At the trial *William* v. *Gwyn* (*b*) was cited, and *Co. Lit.* 32 *b.* and it was contended, that 40*s.* costs in dower having been given, the costs allowed (27*l.* 9*s.*) should be reduced by so much of them as was incurred from the awarding the writ of inquisition downwards; but it is now sought to disallow the whole of those costs, and also the damages of 2*l.* recovered in the action of dower. The only question is, whether the demandant in the writ of dower was entitled to recover costs, and to what extent? Now if she was entitled to recover damages by stat. *Merton*, 20 *Hen.* 3. c. 1. costs will follow by the stat. *Glocester*, 10 *Edw.* 3. But it was said that she ought not to have recovered costs against the present plaintiff, because he had pleaded a plea of *tout temps prist*, which was confessed; but this is not

(*a*) 2 Barnes, 234, cited 2 Saund. 44 (*d*). (*b*) 2 Saund. 42.

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a proper plea of *tout temps prist*, for want of a statement that from the death of the husband he had always been ready to render the dower. (*Williams* here intimated that he meant, in support of his rule, to rely not only on the plea of tender, but on the fact that it did not appear that the husband died seised, in which case alone damages in dower are recoverable.) If the plea is bad, that would not reduce the verdict by all the damages; for by the stat. of *Merton* they would be the value of the whole dower from the death of the husband to the day that the widow, by judgment of the court, hath recovered her seisin thereof. That includes costs, not only to the award of the writ of inquiry, but to its execution. They cited 1 *Richardson's C. P. Practice* (*a*), where the continuing readiness of the tenant, from the death of the husband, to render dower of the tenements, is averred. *Penrice's* case does not turn solely on this point, but to the other point, viz. that the husband did not die seised. Though the inquisition did not state that the husband died seised, but only that he was seised in his lifetime, it will not be intended otherwise than that his seisin continued to the time of the death. In a writ of dower *unde nihil habet*, no such seisin is alleged, *William* v. *Gwyn* (*b*), and the *Register*, fol. 170, cited 2 *Saund.* 43 n. At

(*a*) 4th ed. 438; 5th ed. 509. The judgment there is by nil dicit, and the matter of the plea having been recited, the judgment is, that because by the confession of the widow it appeared to the court that the tenant, from the death of the husband, was always ready to render to the said widow her dower of, &c. therefore that she ought not to recover the value of the third part of the tenements, nor her damages by occasion of detaining her dower from the death of the husband to the day of issuing the original writ; but that she ought to recover that value, and those damages from the day of issuing the original writ; seisin is accordingly awarded, and also an inquisition for damages sustained by the widow, as well by detaining her dower from the day of issuing the original, "as for her expenses and costs laid out in the suit, and the inquisition, &c."

(*b*) 2 Saund. 43, 44.

all events the present defendant having been attorney to the present plaintiff when sued in dower, cannot set up his own negligence in suffering the demandant to recover costs in that action as a defence to the present.

But if he did not die seised, it is not clear that the widow, who had demanded her dower, would be deprived of damages. *Roscoe* on Real Actions (*a*) cites *Jenkins*'s *Centuries*, 45, where it is said, that though the husband does not die seised, yet if the wife demands her dower, she may recover damages from the time of the refusal. Then the objection is doubtful, and comes too late after the finding that nine months had elapsed from the widow's demand of dower, followed up by an assessment of damages for that period of time only, and not from the death of the husband. So that though the jury have not found that the husband died seised, as alleged, the court will not intend that damages were assessed for the time to which the widow was not entitled.

*E. V. Williams* contrà. The widow could not recover costs in dower because she was not entitled to recover damages under stat. *Merton*. First, the plea of tender, if bad on demurrer for not averring *tout temps prist*, is made good by demandant's confessing it to be a proper plea, and by her taking judgment by default and seisin accordingly.

[*Bayley* B. All which is confessed is, that they did tender and are now ready. Tender alone does not exonerate, but as connected with the fact that the tenant has always been ready to render. That defect cannot be supplied.]

Under the statute of *Merton* the persons who are to pay damages are the same class who are to be amerced for the deforcement. Now when a tender is pleaded the defendants are not amerced; *Co. Lit.* 32 *b*. "If

(*a*) 509, note *i*.

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the heir (sued in dower) comes into court on the summons the first day, and pleads that he has been always ready, and still is, to render dower, &c. if the wife has not requested her dower, she shall lose the mesne value and her damages; but if she has requested her dower she may plead it, and issue may be thereupon taken." Lord *Hale*'s MSS. printed in *Hargrave* and *Butler*'s edition of *Co. Litt.* 33 *a*, show that on such a plea by the heir "demandant may take judgment immediately, and then there shall only be recovery of seisin, *et nihil* de misâ *quia venit primo die*." Now *Rastall*'s *Entries*, fol. 228, show that "de misâ" is an abbreviation of *misericordiâ*, after confessing the plea by *nolle prosequi* for damages. *Penrice*'s case (*a*) is only an authority how far the right to damages shall extend. There was no defence there but on the grand cape.

Secondly, The record in dower does not state that the husband died seised. In no case can the widow recover damages unless the husband died seised (*b*), and she, as demandant, must aver it on the record. In *Kerry* v. *Kent* (*c*) it was admitted by *Reeve* (afterwards C. J.) that judgment of damages could not be sustained because seisin of the husband was not suggested on the record. Here the finding was only that he was seised during the coverture, raising the inference that he did not die seised. Now in the record in *Richardson* the jury found the fact of the husband's dying seised, which accounts for the rule established before the statute of wills, that no one but the heir can plead *tout temps prist*. [*Bayley* B. The reason is, that it is not at all necessary that a stranger should plead it, but it is only required where the tenant is to answer for damages.]

(*a*) 2 Saund. 44 *d*.
(*b*) Co. Lit. 32 *b*.
(*c*) 2 Ld. Raym. 1384.

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BAYLEY B. (*a*)—This rule must be made absolute to reduce the verdict to 30*l*. The rule is, that the tenant in dower must always be ready and willing to assign that dower, and if not, must allow to the widow in damages for not being so ready and willing. Here the plea omits the allegation that he has been always ready and willing to render her the dower; and if the right to damages and costs stood singly on the ground whether it was sufficiently stated that the tenant had been ready and willing to assign the dower, and had actually tendered it, I should have thought the defect in the manner of pleading it would not have taken from the demandant her right to recover her damages, though she had confessed the plea. But there is a second objection to the claim of damages and costs, which is, that as it does not appear that the husband died seised, the widow was not entitled by the statute of *Merton*, 20 *Hen.* 3. c. 1. either to damages or costs, and I cannot overcome the difficulty presented by that statute. Its words are, "whoever deforceth widows of their dowers of the lands whereof their husbands died seised, and that the same widows after shall recover by plea, they that be convict of such wrongful deforcement shall yield damages to the same widows; that is to say, the value of the whole dower to them belonging, from the time of the death of their husbands unto the day that the said widows, by judgment of the court, have recovered their seisin thereof; and the deforcers nevertheless shall be amerced, at the king's pleasure." Now at common law there were no damages in dower, and the right to them derived from this statute exists only in those instances where the husband died seised. That appears from what is said in early times, near the period when the statute passed.

(*a*) Lord *Lyndhurst* C. B. was in equity, and *Vaughan* B. was absent, being ill.

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Thus Lord *Coke* distinctly says, *Co. Lit. 32 b.* that "she shall recover damages only when her husband dies seised, that is to say, of the freehold and inheritance; for albeit the husband before the title of dower had made a lease for years reserving a rent, the wife shall recover the third part of the reversion with a third part of the rent and damages; for the words of the statute are "*de quibus viri sui obierunt seisiti.*" The like rule is stated to prevail in the practice and according to the precedents of the common pleas. *Easter*, 11 *Elix. Dyer*, 284. In a note by *Hargrave* and *Butler* to *Co. Lit. 32 b.*, Lord *Hale*'s manuscripts are cited explanatory of what shall be freehold and inheritance in the husband. "First, what shall be said to be a dying seised. Husband makes feoffment to the use of himself for life, remainder to his son in tail, and dies seised, the wife shall not have damages, because he does not die seised of the inheritance, which descends to the son, *T.* 6 *Car.*; and therefore a finding that the husband dies seised, without saying of what estate, is ill, *M.* 5 *Car. Bromley* and *Littleton.*" Thus it is not sufficient that the husband should die seised, but he must be seised of the inheritance. Upon the strict rule of law there ought to have been no damages, because the husband did not die seised; the objection was not taken at the trial; but as it would be to no purpose to send the case down to a new trial, which we must do if the damages are too great, this rule must be made absolute. Mr. *Whitcomb* properly objected that the defendant was attorney for the present plaintiff when sued in dower, and he therefore inferred that it was not for him to say that damages were improperly recovered; but though an attorney is bound to bring to the conduct of a cause all the practical knowledge necessary to conduct it, he is only liable for gross negligence in points of that nature, and not for misapprehension on (*a*)

(*a*) N. B. in line 8 in next page, *for* "this" *read* "that."

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nice questions of law, which in this instance did not occur to his counsel at the trial. Now though the charge of gross negligence may be raised in actions expressly imputing it, it cannot in this form of action. Then we cannot visit the defendant as attorney in the action of dower with the costs occasioned by his act therein, which costs might be recovered back by writ of error in this action (*a*).

BOLLAND B.—I confess, that on looking at the record it appears something equivocal, whether the finding of the jury might not show that the husband died seised; but, considering its terms, it only finds that he died, having, during his intermarriage with the widow, been seised of the premises in fee simple. Had the case really been that he died seised, he would have contented himself with simply stating that fact.

GURNEY B. concurred.

Rule absolute to reduce the verdict to 30*l.* without costs, the point not having been made at the trial.

(*a*) The writ of error would only reverse the judgment in dower quoad costs, *Kerry* v. *Kent*, Ld. Raym. 1384.

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## WILKINSON *against* MALIN and Others.

Where by an ancient deed, *tempore* Hen. 6, land was conveyed to certain persons therein named, and their heirs, in trust to apply the yearly profits to several public objects in a particular parish, and among others to the relief of the poor therein:—Held, that the whole or part of them may be applied to building a school-house and educating the poor children of that parish.

TRESPASS. The first count was on stat. 8 *H.* 6. c. 9. for a forcible entry into a dwelling-house and premises at *W.* of which plaintiff, a schoolmaster, was seised in his demesne as of fee, and expelling him therefrom, alleging special damage of loss of scholars. 2d count, for breaking &c. a certain other dwelling-house of the plaintiff, with asportavit and special damage. 3d count, for an expulsion. 4th, for forcibly turning plaintiff and his family out of possession. 5th, *de bonis asportatis.* 6th and 7th, for assaults.

Pleas.—1st not guilty. (The second and following pleas were confined to the 2d count.) 2d plea, that the

Where the whole number of existing trustees assembled to elect a schoolmaster:—Held, that the act of the majority is to be considered the act of the whole body; for the trust to be performed is of a public nature; and *semble*, that where five concurred and two dissented, but did no act consequent on that dissent, it is a concurrent election by all.

A schoolmaster elected by a majority of trustees at a meeting of the body cannot be dismissed except at a similar meeting.

Where it was stated in pleading that certain persons were seised as of fee of premises, and used same as a school-house and for the residence of the schoolmaster thereof, and that they being so seised appointed a schoolmaster:—Held, that no objection arose on producing a deed showing them to be seised in trust only, and limiting the nature of the appointment and mode of dismissal of a schoolmaster; and that the occupation by him was incident to his appointment as long as that legally continued.

An appointment to the situation of schoolmaster under a conveyance to charitable uses may be made without writing.

A replication to a plea of *liberum tenementum*, stated that the premises in question were the soil and freehold of the persons named in the plea, as trustees of a charitable fund, and in no other right whatever; that the premises were used by the persons named as such trustees for a school-house and for the residence of the schoolmaster; that long before the said times, when &c. a schoolmaster was duly appointed by *the then trustees* of the said charitable fund upon certain terms. Thus no seisin or seisin in fee of the trustees who appointed the plaintiff was stated, nor were they named; no power entitling them to make the appointment was set out, nor were the trusts of the charitable fund, or the deed creating them, stated:—Held, cured by verdict.

A mistake in a deed in a statement of the then occupier of premises, will not vitiate if the description of parcels is the same as in a former conveyance of the same premises, and the intention to pass the same property is clear.

A statement in pleading, that a schoolmaster was appointed on the terms of a salary of 40*l.* and a residence in the school-house, is satisfied by the salary being 20*l.* a year to himself for teaching boys, and the same to his wife for teaching girls.

dwelling-house and premises in said 2d count were and are the freehold of *J. Malin* and *M. Jephcott*, and of *C. Cowley*, *Thomas Cock*, *W. Ellard*, *W. Dester*, *T. Hesom*, *T. Hancock*, *W. Crupper* and *John Cock*. Wherefore *J. M.*, *M. J.*, *T. H.*, *T. H.*, and *T. C.*, in their own right entered, and the said other defendants, as their servants and by their command, entered &c. There were seven other pleas similar in every respect, except stating the freehold to be in different individuals of the above ten.

Replications.—Similiter to general issue. To the 2d plea, that said dwelling-house and premises, &c. were the dwelling-house and premises, close, soil, and freehold of said *J. Malin*, *M. Jephcott*, *C. Cowley*, *T. Cock*, *W. Ellard*, *W. Dester*, *T. Hesom*, *T. Hancock*, *W. Crupper* and *John Cock*, as trustees *of a certain charitable fund* theretofore granted for (amongst other things) the relief of the poor of *W.* aforesaid, and in no other right or capacity whatsoever. That said dwelling-house, &c. were used by said *M. Jephcott*, *J. Malin*, *C. Cowley*, *T. Cock*, *W. Ellard*, *W. Dester*, *T. Hesom*, *T. Hancock*, *W. Crupper* and *John Cock*, as such trustees as aforesaid, and by their predecessors trustees of said charitable fund for a school-house for the education and instruction of divers poor children of and belonging to *W.* as aforesaid; and also as and for the residence of the schoolmaster of said school-house. That long before said several times, when &c. to wit, on 1 *January* 1819, the plaintiff was duly appointed schoolmaster of said school-house *by the then trustees* of the said charitable fund, (the said dwelling-house, &c. being then and there the dwelling-house, &c. and freehold of said last-mentioned trustees) upon the terms and stipulations (among other things) in substance following:—That is to say, that the trustees for the time being of said charitable fund should pay such

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plaintiff the wages or salary of 40*l.* annually, so long as he should continue such schoolmaster of said schoolhouse as aforesaid, and that he the said plaintiff should have the peaceable and quiet possession of the said dwelling-house, &c. as and for his residence as such schoolmaster as aforesaid. That he accepted the said *office* upon the terms aforesaid, and entered into and had the peaceable possession of said dwelling-house and premises as such schoolmaster, and continued in such office and so possessed of the said dwelling-house, &c. from thence until said defendants broke and entered, &c.

Similar replications were filed to each of the above pleas. The defendant demurred generally to the 7th and 8th replications. On argument in a previous term, when the court held the replications to be bad, because the title pleaded was not founded on a seisin in fee, and did not state the names of the trustees, the charitable fund, or the nature of it, they gave leave to amend on payment of costs.

The following new replication was then filed to the 7th plea:—That long before said several times when &c. in said second count of said declaration mentioned, and long before said *W. Dester*, *T. Hesom*, *T. Hancock*, *W. Crupper*, and *J. Cock*, or any or either of them, had any thing in said dwelling-house with the appurtenances therein also mentioned, to wit, on 1 *January* 1819, the said *M. Jephcott*, *T. Malin*, *C. Cowley*, *T. Cock*, *W. Ellard*, one *Henry Mills*, now deceased, and one *T. Ellard*, now deceased, were seised in their demesne as of fee, (amongst other things) of and in said dwelling-house and premises, with the appurtenances, to wit, at *W.* in &c. and then and there used the same as and for a schoolhouse for the education and instruction of divers poor children of *W.* aforesaid, and also as and for the resi-

dence of the schoolmaster of said school-house. And being so seised of the said dwelling-house and premises, with the appurtenances, and so using the same as aforesaid, the said *M. Jephcott*, *J. Malin*, *C. Cowley*, *T. Cock*, *W. Ellard*, *H. Mills* and *T. Ellard*, afterwards and long before the said *W. Dester*, *T. Hesom*, *T. Hancock*, *W. Crupper* and *J. Cock*, or any or either of them, had any thing in said premises, to wit, on &c. at &c. duly appointed said plaintiff to the employment of schoolmaster of the said school-house upon certain terms and stipulations, to wit, the terms and stipulations (amongst other things) in substance following: (that is to say) that there should be paid to the said plaintiff certain wages or salary, to wit, the wages or salary of 40*l.* annually, so long as he should continue such schoolmaster of the said school-house as aforesaid. And that he said plaintiff should be suffered and permitted to have the peaceable and quiet possession, use, occupation and enjoyment of the said dwelling-house and premises, with the appurtenances, as and for his residence as such schoolmaster as aforesaid, until his dismission from said employment by a majority of the persons who, for the time being, should be seised of and in said premises. And plaintiff further saith, that he then and there accepted the said employment upon the terms and stipulations aforesaid, and then and there entered into and had the peaceable and quiet possession, use, occupation and enjoyment of the said dwelling-house and premises, with the appurtenances, as such schoolmaster as aforesaid, and remained and continued in such employment and so possessed of said dwelling-house and premises, with the appurtenances and stipulations aforesaid, from thence continually until said defendants afterwards, and whilst said plaintiff was schoolmaster as aforesaid, upon the terms and stipula-

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tions aforesaid, to wit, at said several times when, &c. of their own wrong, broke and entered into the said dwelling-house and premises, with the appurtenances, and committed the several trespasses, &c.

The like (new) replication to the 8th plea.

Rejoinders.—As to replication to 2d plea, That the said dwelling-house, &c. in said 2d count of said declaration mentioned, were not the freehold of the said *M. J.* &c. as trustees of a certain charitable fund theretofore granted, for (amongst other things) the relief of the poor of *W.* aforesaid, and in no other right or capacity whatsoever.

To replication to 3d plea, That the said dwelling-house, &c., were not used by said *J. Malin*, &c. as such trustees as aforesaid, and by their predecessors, trustees of said charitable fund, as and for a school-house for the education and instruction of divers poor children, of and belonging to *W.* aforesaid, and also as and for the residence of the schoolmaster of said school-house.

To replication to 4th plea, That said plaintiff was not duly appointed schoolmaster upon the terms and stipulations in said replication mentioned.

To replication to 5th plea, That said plaintiff was not duly appointed schoolmaster of said school-house by the then trustees of said charitable fund, upon the terms and stipulations, amongst other things, that the trustees should pay plaintiff certain wages or salary of 40*l.* annually so long as he should continue such schoolmaster of, and that said plaintiffs should have the peaceable occupation of said dwelling-house and premises as and for his residence as such schoolmaster as aforesaid.

To replication to 6th plea, That he did not remain and continue in such office, and so possessed of said

dwelling-house and premises, &c., in manner and form as said plaintiff hath in his said replication to said 6th plea alleged.

To replication to 7th plea, the said defendants *T. Hesom, T. Hancock, W. Quinney, W. Allibone, T. Hudson* and *A. Musson*, protesting that the said *M. Jephcott, J. Malin, C. Cowley, J. Cock, W. Ellard, H. Mills* and *T. Ellard*, did not, before the said several times when, &c., and before the said *W. Dester, T. Hesom, T. Hancock, W. Crupper* and *J. Cock*, or any or either of them, had any thing in the said premises, duly appoint said plaintiff to the employment of schoolmaster of the said school-house, upon the terms and stipulations, (amongst other things) in substance, that there should be paid to that said plaintiff certain wages or salary of 40*l.* annually, so long as he should continue such schoolmaster of the said school-house as aforesaid, and that he said plaintiff should be suffered and permitted to have the peaceable and quiet possession, use, occupation and enjoyment of said dwelling-house and premises, with the appurtenances, as and for his residence as such schoolmaster as aforesaid, until his dismission from the said employment by a majority of the persons who for the time being should be seised of and in the said premises. For rejoinder, nevertheless, to said replication in his behalf, the said *T. Hesom, T. Hancock, W. Quinney, W. Allibone, T. Hudson* and *A. Musson*, say, that all the said supposed interest and right of possession of the said plaintiff, of and in or to the said dwelling-house or premises, in which &c., long before either of said times when &c., in said 2d count mentioned, had been lawfully put an end to and determined, to wit, at &c., yet the said plaintiff, although afterwards, to wit, at the first of the said times when &c. in said second count mentioned, to wit, on the said 21st day of *February* in the year 1831 aforesaid, to

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wit, at &c., duly requested by said defendants the said *T. Hesom* and *T. Hancock*, wholly refused and neglected to quit or deliver up possession of said dwelling-house and premises in which &c., to them the said *T. Hesom* and *T. Hancock*, wherefore *T. Hesom* and *T. Hancock*, in their own right, and *W. Q.* &c. as the servants of the said *T. H.* and *T. H.* committed the said several supposed trespasses in 7th plea mentioned, &c.

To replication to 8th plea, That said *M. Jephcott*, *J. Malin*, *C. Cowley*, *T. Cock*, *W. Ellard*, *H. Mills* and *T. Ellard*, did not, before said several times when &c., and before said *W. Dester*, *T. Hesom*, *T. Hancock*, *W. Crupper* and *J. Cock* had any thing in the said premises, duly appoint said plaintiff to the appointment of schoolmaster of said school-house, upon the terms and stipulations, amongst other things, in substance, that there should be paid to said plaintiff certain wages or salary, to wit, the wages or salary of 40*l*. annually so long as he should continue such schoolmaster of said school-house as aforesaid, and that he, said plaintiff, should be suffered and permitted to have the peaceable and quiet possession, use, occupation and enjoyment of the said dwelling-house and premises, with the appurtenances, as and for his residence as such schoolmaster as aforesaid, until his dismission from said employment by a majority of the persons who for the time being should be seised of and in the said premises.

To replication to 9th plea, That said plaintiff, on the 25th *December* 1830, was lawfully dismissed from his said office of schoolmaster.

To replication to last plea, That on the said 25th *December* 1830, all the estate and interest of him the said plaintiff, of and in said supposed office of schoolmaster, in said replication to said last plea mentioned, and of and in said dwelling-house and premises in said

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2d count mentioned, had been lawfully ended and determined. On all these rejoinders issues were joined in surrejoinders and rebutters.

This cause was twice tried. At the second trial at the Lent assizes for *Warwickshire* in 1832, before *Bayley* B. the following facts appeared in evidence. By deed dated 12 *Hen.* 6. *J. Hayward* and *M.* his wife granted and conveyed divers messuages, lands, tenements, and hereditaments, situate in *Willoughby*, and other places in the county of *Warwick*, to certain trustees therein named and their heirs, "upon trust to apply the yearly issues and profits thereof from time to time towards the repairs of the church of *W.* aforesaid, the payment of the 15ths and relief of the poor in *W.*, buying of armour and setting forth soldiers, mending of causeways and highways in *W.*, and repairing of *Sawbridge* bridge, in the parish of *W.* aforesaid."

By order of certain commissioners of charitable uses, confirmed by the court of Chancery 10 *July*, 7 *Jac.*, it was ordered that certain fraudulent leases of the said trust premises should cease, and that the then surviving feoffees of the same should convey to ten trustees therein named and their heirs, upon trust that the issues and profits should from time to time be employed to the aforesaid charitable uses, and that in what manner the same should be employed by the said trustees should be contained in the deed of conveyance; and that when all the said feoffees to whom the premises were to be conveyed should be dead, saving five, that then the five surviving feoffees should, upon the like trust, make like conveyance by deed, intended to the use of themselves and five other persons, inhabitants of *W.* aforesaid, of the best and most sufficient persons and their heirs.

By lease and release of 22 and 23 *May* 1807, the trust premises in *Willoughby*, described as being "now

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or late in the tenure or occupation of *John Cowley* and *William Cowley*," were conveyed by the then surviving trustees to ten new trustees.

Long before 1816 a school had been established for the education of the poor of *Willoughby*, the expenses of which had been paid out of the above trust funds. The income of the charity having for many years averaged 400*l.* per annum, the trustees in that year, in exercise of the discretion given them by the said trust deeds of applying the said funds generally towards the relief of the poor of *W.*, applied part of such funds in the erection of a school-house and other requisite buildings for the purposes of such school, on the lands in *W.* described in the deed of 1807.

On 26 *December* 1816, the trustees for the time being appointed a schoolmaster and mistress, at a salary of 40*l.* per annum.

In *September* 1818, all the trustees then remaining, being seven in number, viz. *J. Malin*, *T. Ellard*, *W. Ellard*, *M. Jephcott*, *C. Cowley*, *T. Cock*, and *H. Mills*, assembled for electing a schoolmaster, and, after some intimation of dissent by two of them, the other five concurred in electing the plaintiff, but no formal voting took place. Plaintiff was then told that he must be a married man, that the salary was to be 20*l.* to the master and 20*l.* to the mistress, that it was required he should be competent to teach the boys and she the girls. The plaintiff was afterwards duly licensed to perform the office of schoolmaster in the school by the bishop of the diocese (*a*). In *January* 1819 the plaintiff and his wife entered on their duties, and became occupiers of the school-house and premises.

By lease and release of 26 and 27 *November* 1827, *M. Jephcott*, *J. Malin* and *T. Cock*, *C. Cowley* and *W. Ellard*, being the only surviving trustees for the con-

(*a*) See 3 Burn's Eccl. Law, 326. Tyrwhitt's edit.

siderations therein mentioned, released and conveyed the messuage or tenement, land, &c. forming the trust premises in *W.*, describing them as "formerly in the tenure or occupation of *John Cowley* and *William Cowley*, and now of *William Cowley*," together with all and singular houses &c. to the said messuage &c. and premises, and to every or any of them belonging or in any wise appertaining, or accepted, reputed, deemed, taken or known as part, parcel or member thereof, or of any part thereof, unto and to the use of *W. Dester*, *T. Hesom*, *T. Hancock*, *J. Cock*, *W. Crupper*, and their heirs, on trust that they the said *M. Jephcott*, *J. Malin*, *T. Cook*, *C. Cowley*, *W. Ellard*, *W. Dester*, *T. Hesom*, *T. Hancock*, *J. Cock*, and *W. Crupper*, and their heirs, should employ the yearly income, rents, issues and profits of all and singular the said hereditaments and premises, from time to time, towards such charitable uses, intents and purposes as in the said original deed of grant mentioned.

The plaintiff relied on this deed and that of 1807. *Dester* always refused to act as a trustee or to execute the deed of 1827, but also refused to suffer his name to be struck out of it.

Disputes having arisen between some of the trustees and the plaintiff, on 14 *January* 1830 two notices were served on the plaintiff, one signed *J. Malin*, *M. Jephcott*, *T. Cock*, *T. Hesom*, and *T. Hancock*, purporting to be a discharge of the plaintiff from his office of schoolmaster, from the 25th *December* then next, and requiring him to give up possession of the school-house and premises from and after that day or other end of the year of his tenancy which should expire next after half a year from the delivery thereof.

On 25 *January* 1831, another notice signed by the same trustees was served on plaintiff, demanding peaceable possession of the school-house, garden and pre-

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mises, and giving him notice to quit. They afterwards turned him out of possession by the trespasses complained of. The jury gave a verdict for the plaintiff on the 2d and 6th counts, assessing the damages separately on each, and in answer to a question from the judge, found that the plaintiff held at 40*l.* a year.

In *Easter* term, *Goulburn* Serjt. moved to set aside the verdict and enter a verdict for the defendant; or why judgment on the second count should not be arrested.

On the general issue as applying to the second count the defendants had a right to prove title to the land, so as to justify entry under it; *Dodd* v. *Kyffin* (*a*), *Taunton* v. *Costar* (*b*), *Argent* v. *Durant* (*c*). The right to enter may be asserted as a matter distinct from any remedy by the occupier for forcible entry; *Turner* v. *Meymott* (*d*).

Next, on the 2d issue. Did the school-house pass by the conveyance of 1807? At the time when the plaintiff took possession under his appointment, five trustees had conveyed to *Dester* and four others besides themselves. The plaintiff claimed under the deed of 1827, and said in his replication that the ten persons therein named were seised as trustees of the charitable fund, and in no other capacity; thus raising and affirming the defendants' character of trustees. The evidence was, that *Dester*, though his name was inserted in the deed of 1827, refused to execute or do any act under it.

As to the 3d issue. Did the school-house, or any part of its site, pass under the deed of 1827? The premises, &c. in *Willoughby* are there described as "now in the occupation of *Wm. Cowley*," the parcels

(*a*) 7 T. R. 354. (*b*) Ibid. 432.
(*c*) 8 T. R. 403; *Bartholomew* v. *Ireland*, Andrews R. 109, *S. P.*
(*d*) 1 Bing. 158.

being in other respects similar to those in the deed of 1807, but the school-house being then in the plaintiff's occupation. In 1807, the land on which it was afterwards erected was in the occupation of the *Cowleys*. But there are sufficient matters on which the deed would take effect, without including the school-house or its site; so that in the absence of ambiguity evidence will not be admitted to vary its description so as to include matters within its terms, if they can be satisfied without; and the rule is the same as to wills, *Doe* v. *Greening* (*a*), *Doe* v. *Oxenden* (*b*).

As to the issue raised on the 4th plea. Of the number of existing trustees assembled to appoint a schoolmaster, two dissented. Taking it from the replication to be an office, could five, the majority, appoint? *Withnell* v. *Gartham* (*c*) turned on a peculiar deed of foundation and usage under it. As no such deed exists in this case, the question would be, what authority the trustees had to build the school-house, or when built what authority had *a majority* to appoint a schoolmaster. Moreover, if it is an office it is one to which an interest in land is appurtenant, and the appointment should have been by deed; *Saunders* v. *Owen* (*d*), *2 Inst.* 49 *a*.

As to the issue on the 5th plea; the terms stated in the replication to that plea were, that the trustees should pay the plaintiff the wages of 40*l*. annually as long as he continued schoolmaster. Those proved were, that the schoolmaster was to be a married man, who should receive 20*l*. for teaching the boys, and his wife 20*l*. for teaching the girls. That is a clear variance.

As to the 6th, 9th, and 10th issues, raising the question of the validity of the plaintiff's dismissal from his office, *Goulburn* did not now contend that the dismissal was good, *Tindal* C. J. on the first trial having

(*a*) 3 M. & S. 171. (*b*) 3 Taunt. 147.
(*c*) 6 T. R. 388. (*d*) 1 Salk. 467; 1 Ld. Raym. 158, *S. C.*

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referred to *Doe* v. *Gartham* (*a*), as conclusive that it was invalid, if the appointment was assumed to be good.

On the 7th issue the defendants say, that the interest and right of possession of the plaintiff of and in or to the said dwelling-house or premises in which &c. had been lawfully put an end to. The plaintiff's situation as schoolmaster is called in the 7th replication an employment. Then his interest in the premises is an appointment by five out of seven persons seised of the land, not stated to be trustees, to teach children; and it is admitted on the 7th issue that five trustees, viz. a majority of the existing trustees, have given him notice to quit; now a notice to quit by one joint-tenant is good on behalf of the others; *Doe* v. *Summersett* (*b*). Suppose five out of seven had thought fit to build a schoolhouse and appoint a master, could the five appoint a master or could they convey an interest in land, notwithstanding the dissent of the other two? If they could, *what* interest could they confer? it would either be an estate for life, subject to defeazance, *Doe* v. *Brown* (*c*); or at will, viz. till he should be dismissed by a majority of persons seised, which he has been, as the notice to quit is by the pleadings admitted, *Doe* d. *Jones* v. *Jones* (*d*), *Doe* d. *Nicholl* v. *M'Kaeg* (*e*).

As to the 8th issue, the terms of appointment laid in the replication were not sustained in evidence. At the time of the appointment nothing was said as to the time he was to occupy; the terms laid in the replication were, that he should occupy till dismission by a majority of the persons who for the time being should be seised of the premises: now there was no proof of any such terms.

He also moved in arrest of judgment on the 2d repli-

(*a*) 1 Bing. 357. (*b*) 1 B. & Adol. 135. (*c*) 8 East, 159.
(*d*) 10 B. & C. 718. (*e*) Ibid. 721.

cation, on the grounds, 1. That that replication not having alleged a seisin in fee in the trustees, contained no statement of title, and did not merely state title defectively; *English* v. *Burnell* (*a*), *Roe* v. *Kersey* (*b*). 2. That the names of the trustees who appointed the plaintiff were not stated: and 3. That no power entitling them to make such appointment was alleged: nor were the trusts of the charitable fund mentioned in the replication set forth, nor was the deed creating those trusts set forth.

*The Court* granted the rule for arresting the judgment; on the next day

Lord *Lyndhurst* C.B. said—The court will grant a rule on the issues arising out of the 4th, 7th, and 8th pleas, but not on the other issues.

The defendants in their 2d plea originally affirm that the premises were the soil and freehold of the ten persons named, including *Dester*. The replication is soil and freehold of those ten persons as trustees of a charity, and in no other right; thus limiting the defendants' general allegation of soil and freehold in themselves. The rejoinder is, that the premises were not the soil and freehold of the ten as trustees. On this state of pleadings the nature and quality of the estate are not in issue, and the soil and freehold is admitted to be in the ten. The only question is the character in which they are so seised, whether as trustees or not? A conveyance to the ten in 1827 appears. It is true *Dester* refused to accept the appointment of trustee, or to act under the trust, but he also refused to let his name be struck out of the deeds, so as to substitute another. The pleadings, by admitting soil and freehold to be in the ten, admit it to be in *Dester*, and in

(*a*) 2 Wils. 261.

(*b*) 3 Wils. 274. And see 1 Saund. 228 *b*. Ibid. n. (*i*), 2d edit. 137 (*a*).

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him as trustee; for it is not pretended that he took in any other character.

Another point was made on the issue raised by the 3d plea, that the school-houses were not conveyed by the deed of 1827, though the premises passed by the deed of 1807. They are similarly described in both, and on looking at the scope of both deeds it is quite clear that the intent of the latter was to pass the same property which had been conveyed by the former. Then the misdescription of the occupation in the deed of 1827 will not vitiate, and the words are sufficiently large to effect the intention, *Doe* d. *Conolly* v. *Vernon* (*a*), *Doe* d. *Tyrrell* v. *Lyford* (*b*).

On the issue raised out of the 4th plea the question is, Whether an appointment by a majority of the trustees was valid? Seven trustees existed; at a meeting regularly convened for the purpose of the election of a schoolmaster, five agreed, two objected. The meeting was legally convened, five agreed in the appointment against the opinion of the other two. That being a point of great importance and doubt, a rule is granted on that.

It was also contended that the plaintiff's office or employment was an office incident or appurtenant to an interest in land, and could therefore only be conveyed by deed. But the plaintiff's interest is of this description;—the schoolmaster is to reside in the schoolhouse while he remained such, but might be removed at reasonable notice, and would then lose the right to reside there. The plaintiff takes the office not as incident to the land, but accruing to him out of his nomination by the trustees, as part of the contract between them. If it were incident to the land, whoever had it would have the office, which is not the case. The word "office" has more than one legal meaning—

(*a*) 5 East, 51. (*b*) 4 M. & S. 550.

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it may have been improperly used here, as no assize would lie for this, which is properly an appointment only.

The issue arising on the 5th plea raises a question of variance. The replication alleged that the plaintiff's appointment was on certain terms, viz. a salary of 40*l.* and a residence in the school-house; whereas his salary was proved to be 20*l.*; but as the husband would be entitled to the 20*l.* a year earned by his wife, he would substantially have 40*l.* per annum. There is therefore no variance, and no rule can be granted on the 5th plea.

The 6th, 9th, and 10th issues, raise the question as to the validity of the plaintiff's dismissal, which has not been pressed on this occasion. Each of the replications states the freehold to be in the defendants in their character of trustees. We are of opinion the dismissal was irregular, no previous meeting having been convened for the purpose. It is not necessary for us to decide whether, if a meeting of the trustees had been regularly called, and a majority of them, when so assembled, had adopted the resolution of dismissing the master, that would or would not have been the act of the whole; for at such a meeting discussion is presumed to take place. Here the act of the majority, in giving the notice of dismissal, being done without a meeting, affords no opportunity for discussion of the subject, and seems insufficient and beyond their discretion as trustees. No rule will therefore be granted on that point.

On the 7th and 8th issues the defendants are stated to be seised in fee of the premises, stripped of their character of trustees. But they are more than joint tenants, for on evidence given a court of common law takes cognizance what a trustee is. The plaintiff's interest seems to be neither for life subject to defeazance, nor at will, but a middle term, viz. a right to the

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employment till dismissal by the trustees, or a majority of them (*a*). On the 8th issue the question is, whether the appointment is valid by five, who are here merely stated to be seised in fee, and not "as trustees"; or whether parties are not acting as trustees who are clothed with no trust. Then there is stronger ground for a rule on this than on the 4th issue, on which it has been already granted. The same observation applies to the 7th issue. Afterwards in this term,

*Clarke*, *Adams* and *Stephen* Serjts. *Humfrey* and *Busby* showed cause. The objection is, that the issues raised on the 4th, 7th, and 8th pleas and replications are not proved. Now, if the evidence established an appointment by the whole body of persons, there is no such difference between the 4th and 8th issues as has been suggested, viz. Whether they were trustees or not? The whole body of persons competent to elect, viz. the seven persons named in the replications, met in a room for the purpose of the act of election, and the plaintiff having been named as a candidate, some objection was taken to him by two, but not being followed up by a proposition of or voting for any other candidate, he was elected. In *Oldknow* v. *Wainwright* (*b*), the question being whether *Segrave* was legally elected? it appeared that the whole body of twenty-five electors having been duly summoned, twenty-one attended, nine voted for him, eleven protested against him without voting for any other; and a twelfth refused to do any thing. Lord *Mansfield* said, that as there was no voting for any other than *Segrave*, or at least as none had taken place against him, the election was valid, those who protested only having

(*a*) *Bayley* B. mentioned *Rex* v. *Inhabitants of South Newton, Wilts*, 10 B. & Cr. 838.

(*b*) 2 Burr. 1017. *Rex* v. *Foxcroft*, ibid. 1 Sir W. Bla. 229, S.C.

virtually consented. In this case no protest against the plaintiff's election, no proposition of another candidate, or voting for or against the plaintiff, took place. As nothing appeared to show that he was not duly elected, the election was virtually by the seven, viz. the whole body; so that there is no difference between the 4th, 7th, and 8th replications, and the verdict is sustainable on all.

But an election by five only, excluding the two who dissented, would be valid as made by a majority of the existing trustees; and their act, as such, would bind the whole, for this is not a bare trust but a charitable trust. Though *Withnell* v. *Gartham* (*a*) stands on its own specific grounds, it tends to establish the principle that the nature and objects of the trust are ingredients in the discussion, whether a majority of the trustees shall act? So in *Rex* v. *Beeston* (*b*) the argument of inconvenience from the obstinacy of a single man was admitted in a question whether the whole of the churchwardens and overseers must contract for feeding the poor. [*Bolland* B. Can charitable uses be kept in abeyance by a similar obstacle? Lord *Lyndhurst* C. B. In *Grindley* v. *Barker* (*c*), *Eyre* C. J. says, "where a number of persons are trusted with powers not of mere private confidence, but in some respects of a general nature, and all of them are regularly assembled, the majority will conclude the minority, and their act will be the act of the whole" (*d*).]

Then either all those persons did concur, or a majority having power to bind the rest appointed. In *Rex* v. *Whitaker* (*e*) three assessors appointed under a local act met to apportion the expenses of the drainage of a particular district. It was held, that the

(*a*) The *Skipton* case, 6 T. R. 388. (*b*) 3 T. R. 592.
(*c*) 1 B. & P. 236. See 9 B. & C. 651, 859.
(*d*) And see Co. Lit. 181 b. (*e*) 9 B. & C. 648.

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making the apportionment being a matter of public duty and trust, an apportionment made by two at a meeting of the three was valid. *Grindley* v. *Barker* was there relied on; and was cited by *Bayley* J. in *Blacket* v. *Blizard* (*a*) to prove that if a power of a public nature be committed to several, who all meet for the purpose of executing it, the act of the majority will bind the minority. Then there being a virtual election by the whole, the only question of difference between the 7th and 8th replications does not arise.

The issue raised upon the 4th plea and replication is, that the plaintiff was not duly appointed schoolmaster on the terms mentioned in the 4th replication. The question is, whether the persons appointing were empowered to act as trustees? For though in one part of the record they are stated to have power as such, and in another are not, the proof is the same in both. Where a majority may and do appoint, the best course is to plead that the whole appointed; for that is the legal effect and conclusion from the fact of appointment (*b*). The pleadings, though not alleging the office to be created by deed, state what it was; and if it had not been also laid to be an employment, it would amount to no more. As well might it have been said in *Doe* v. *Jones* (*c*) that the dissenting minister's interest in the meeting-house could not be created but by deed. Lord *Coke*'s definition of an office is, "If a house or land belong to an office, by the grant of the office by deed, the house or land passeth as belongs thereunto." (*d*)

The allegation in the 8th replication is, that the plaintiff did duly accept the office till dismissed by the majority, and has been proved; for its legal effect is, that

(*a*) 9 B. & C. 859.

(*b*) See *Stephen* on Pleading, ch. II. sec. V. rule VI. pa. 389. 1st edit. 1 Chit. on Pleading, 4th edit. 270. 311.

(*c*) 10 B. & C. 718.

(*d*) Co. Lit. 49 a.

as the trustees cannot act but by a majority, the plaintiff should be dismissed by a majority only. The protestation in the rejoinder admits the number of trustees to be ten, and that the plaintiff could only be dismissed by a majority. Then the plaintiff says the interest had not been determined by a majority.

Judgment should not be arrested, for all the replications otherwise defective on general demurrer are here cured either by the defendants having pleaded over or by verdict. All the replications except the 7th and 8th resolve themselves into the same. But the replication to the 2d plea is said to be bad for uncertainty, the persons appointing not being named, and though called trustees, no deed constituting them such having been set forth. However after a finding that certain persons, whether trustees or not, were seised, it is immaterial whether they were named in the pleadings or not. *Ward* v. *Harris* (*a*).

The ambiguity of expressing the premises to be defendants' soil and freehold, without stating title, is cured by the defendants having rejoined; for though an equivocal expression is in pleading to be construed against the party using it, yet if the opposite party pleads over, it is to be considered in that sense which will best support the previous pleadings; *Hobson* v. *Middleton* (*b*), *Avery* v. *Hoole* (*c*). Nor is the allegations of soil and freehold by way of title more ambiguous than seisin, or seisin in fee (*d*), and if any sense can be ascribed to it which will support the replication that is enough.

[*Bayley* B. The words in the replication "in manner and form as above alleged" must admit seisin to be as in the plea alleged, and 1 *Saund.* 228, shows that a

(*a*) 2 B. & P. 265.

(*b*) 6 B. & C. 295. See 3 B. & A. 437, and 1 B. & C. 297.

(*c*) Cowp. 825; 2 Doug. 685. (*d*) See 1 Saund. 347 *d.* n. (*b.*)

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plea of *liberum tenementum* would be sustained by proving tenancy in fee or in tail]

*Goulburn* Serjt. and *M. D. Hill* in support of the rule. First, as to the 4th replication. It alleges the plaintiff to have been duly appointed a schoolmaster by the trustees upon terms therein stated, and admits the fact that he accepted the said *office* upon those terms, and entered into possession of the dwelling-house &c. as such schoolmaster, and continued in such office and so possessed till the trespasses complained of. Then on all the issues except the 7th and 8th the affirmative is on the plaintiff to prove his due appointment to this *office*, the distinction in which respect between the 7th and 8th issues and the rest is material.

But the appointment proved is bad; for, First, it was not by a majority of trustees, only five persons having appointed, and two others having objected before and after the appointment. The dictum of *Eyre* C. J. in *Grindley* v. *Barker*, appears contrary to the former case of *Rex* v. *Beeston* (*a*). The question there was, whether, under 9 *G.* 1. c. 7. enacting that "*the* churchwardens and overseers" of a parish, with consent of a majority of the parishioners, might contract for feeding the poor, it was necessary that every one of them should concur; and the decision that it was not so necessary proceeded on the words of 43 *Eliz.* c. 2. which being one of the poor laws, was in *pari materiâ* with the act on which the question arose, and expressly provided by sections 1 & 5, that a majority of them might do certain general acts respecting the poor. Lord *Kenyon* founds his judgment expressly on that ground; rejecting the argument of similitude of churchwardens and overseers to a corporation, but recognizing the position contended for, in matters of private confidence, that

(*a*) 3 T. R. 592.

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where a power to do a particular act is given to several persons without authority to act severally as well as jointly, it can only be done by the whole body. Then that case does not apply to a foundation altogether private, or to private individuals appointed under it, and is a mere exception to the general rule as to a bare authority in *Co. Litt.* 112 *b*. " where power is given to executors to sell, all must join in the sale; and if one dies, it is regularly true that being but a bare authority the survivors cannot sell." The section itself (*Litt.* s. 169) points at the religious object for which the sale was directed to be had, viz. to raise a sum to be distributed for the testator's soul, probably (*a*) for saying masses, a superstition common and legal in *Littleton*'s time. Lord *Coke* adds, " That if executors had been named by their names as *J. S.*, *J. N.*, *J. D.* and *J. G.* his executors, then though one died in the life of the testator the survivors could not sell after testator's death, because his words could not be satisfied" (*b*). Now here the trustees are named,

*Withnell* v. *Gartham* and *Barker* v. *Grindley* were much argued on the inconvenience of obstinate opposition by one man. In the former case however the judgment proceeded on the necessity imposed by the deed on the vicar and churchwardens to appoint a schoolmaster, and that circumstance was treated as ancillary only. Besides the jury there found that a usage existed to elect a schoolmaster by a majority of the vicar and churchwardens. [Lord *Lyndhurst* C. B. Lord *Kenyon* founded his opinion that such majority might elect on the intention of the founder apparent on the deed, and without regard to the usage; and Mr. Justice *Lawrence* assented.] Lord *Kenyon* and Mr. J. *Grose*

(*a*) *Harg.* and *Butler*'s note 145 to *Litt.* s. 169.

(*b*) Lord *Kenyon*, in *Withnell* v. *Gartham*, 6 T. R. 396, observes on this doctrine.

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adopt the observation of counsel, that the power given to the vicar and churchwardens was classed with the same power afterwards given by devolution from them to other bodies undoubtedly public.

[Lord *Lyndhurst* C. B. That argument also turned on the intention of the founder; and if it were otherwise, then, though like the usage it might be considered a material fact by Lord *Kenyon*, he formed his opinion independently of either. Nor can the passage cited from C. J. *Eyre*'s reported opinion in *Grindley* v. *Barker* be called a mere dictum; for as the principle there laid down is sufficient to decide that case, the judgment is a necessary conclusion from those premises. Where two principles exist on which a case may be decided, and both are mentioned in the judgment, but without resting it on either to the exclusion of the other, neither can be called a mere dictum.]

The opinion so expressed by *Eyre* C. J. was unnecessary, for in that case the body of triers had a judicial power of a public nature confided to them under a public act, and thus resembled a jury assembled by similar authority; so that the act of the majority of triers would confessedly bind the minority. Whereas, here a schoolmaster was appointed by private individuals, under a private deed of foundation. [Lord *Lyndhurst* C. B. Your argument must go to this extent, that where the objects of a charity are of a public nature, and enumerated as in this instance, but the funds are only of a private nature, a majority of the trustees will not bind the minority.] The bequest of funds by a private person to other like persons, though for the benefit of the public, does not make the trust public. *Cook* v. *Loveland* (*a*) shows the case where a majority would have sufficed, being a grant from the crown to the master and wardens of a corporation, *i. e.* a public

(*a*) 2 B. & P. 3, cited by *Bayley* J. 9 B. & C. 857.

body. In *Cortis* v. *Kent Water-works* (*a*), the treasurer was held well appointed by a majority of commissioners under the terms of a local act. *Rex* v. *Whitaker* (*b*) distinctly shows that in a matter of public duty and trust, not of private authority, like a reference or award, the act of a majority, after a proper meeting, is good; so the distinction of a public trust from a trust or power of a private nature, is again stated by *Bayley* J. in *Blackett* v. *Blizard* (*c*). [Lord *Lyndhurst* C. B. The repairing highways is one of the objects here intended; as drainage was the object in *Rex* v. *Whitaker*.] *Oldknow* v. *Wainwright* is not applicable, for the act there held valid was done by a majority of a corporate body met in pursuance of summons to exercise their franchise of election.

Secondly, This was an office taking effect not out of a power or authority or by way of appointment, but out of and as coupled with an interest in land; being by parol therefore it is bad, *Owen* v. *Saunders* (*d*).

Passing to the 8th issue, whether the plaintiff was duly appointed schoolmaster of the school-house, to have the possession of the dwelling-house and premises, till his dismission "by a majority of persons, who for the time being should be seised of and in the said premises;" there is no statement who the latter persons are, or that they were any of those by whom the plaintiff was appointed: whereas allegation as well as proof is necessary to support a verdict. Again, seven persons are alleged to be seised in fee of the land, and the pleading admits an interest in land to have passed from seven of them; but the evidence is,

(*a*) 9 B. & C. 652. (*b*) 9 B. & C. 648.

(*c*) 9 B. & C. 857.

(*d*) In C. P., 1 Ld. Raym. 158; *Saunders* v. *Owen*, *S. C.* in error, in K. B. Salk. 250; 5 Mod. 368; 12 Mod. 199; Carth. 426; Colles's Parl. Cases, 70.

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that only five at a meeting professed to part with that interest. The question is as in *Doe* d. *Warner* v. *Brown* (*a*), what estate is the plaintiff contended to have? If for life, there is no conveyance by deed; if at will, it has been determined by the notices to quit of five trustees, *Doe* v. *Summersett*, *Doe* v. *Jones* (*b*), *Doe* v. *M'Kaeg* (*c*).

By the words "relief of the poor," the trustees have not power to divert the funds for their gratuitous education. Those words must be taken in the meaning of bodily relief, which would have been ascribed to them at the time they were used by the founder, and down to the enactment of poor laws. Such a literal construction being in diminution of the poor rate, would be within the terms of the grant, and would lead to no inconvenience, so that the doctrine of *cy pres* would not apply.

[Lord *Lyndhurst* C. B. The terms "relief of the poor," are large enough to justify the trustees in this exercise of their discretion, by applying the funds at this day to educate the poor. Supposing the poor to receive assistance in the shape of food, &c., aliunde, could not the funds be otherwise applied?]

Lastly, judgment should be arrested; for every replication but the 7th & 8th is bad, and was so held to be on demurrer, for confessing the legal title of soil and freehold set out in the plea, they do not avoid it by stating another and better. The plaintiff relies on a particular estate, created by certain persons designated as "the then trustees," but without carrying it up to a seisin in fee in them, or in any other named persons (*d*). On the contrary, he alleges their title and seisin to be only equitable, viz. as trustees.

(*a*) 8 East, 166. (*b*) 1 B. & A. 135. (*c*) Ibid. 721.
(*d*) Co. Lit. 303 *b*., and cases collected, Stephen on Pleading, 1 ed. 366.

Then no title at all is set out (*a*), and it is not a mere ambiguity as in *Huntingtower* v. *Gardiner* (*b*), or a defective statement of a sufficient title, as in *Harris* v. *Beavan* (*c*), where an allegation, that *Charles Bartholomew* was seised, (without more) and had devised to plaintiff and his heirs, was held cured by verdict for plaintiff, who claimed in fee under the devise. There a seisin in a named person was taken after verdict to be a seisin in fee, but here the parties in whom the title originates are not named. It was necessary that the replication should state the first seisin in fee in unambiguous terms, *King* v. *Coke* (*d*), *Lambert* v. *Strother* (*e*). Again, the statement of soil and freehold in the persons named is ambiguous (*f*), and insufficient to show the commencement of a particular estate. In *Ward* v. *Harris*, Lord *Eldon* differed from the other judges, and the case at utmost only cures the statement that defendants were trustees of a "certain charitable fund." There is nothing on the replication to show that the trustees had any power to apply money to build a school-house, or to connect it with the land belonging to the charitable fund, *Rushton* v. *Aspinal* (*g*). They also cited *Burendin* v. *Sharp* (*h*), *Avery* v. *Hoole*, Lord *Ellenborough*'s judgment in *Jackson* v. *Pesked* (*i*), *Butt* v. *Howard* (*k*), and *Mitchell* v. *Walker* (*l*).

*Cur. adv. vult.*

In this term Lord LYNDHURST C. B. delivered the judgment of the court.—One of the points argued at the bar, and which stands for the decision of the court is,

(*a*) 1 Saund. 228 *b*; *id.* n. (*i*).

(*b*) 1 B. & C. 297. As to this case see *Sheppard* v. *Hall*, 1 B. & Adol. 437, per *Patteson* J. (*c*) 4 Bing. 646. (*d*) Cro. Car. 384.

(*e*) Willes, 218. (*f*) 1 Saund. 347 *d*, n. 6.

(*g*) Doug. 658; Cowp. 825. (*h*) 2 Salk. 667. (*i*) 1 M. & S. 234.

(*k*) 4 B. & Ald. 655. (*l*) 5 T. R. 260.

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Whether or not the plaintiff was duly appointed master of the school which is the subject of this inquiry? A charity was established in the reign of *Henry* the 6th, and certain trustees were appointed, to whom certain estates were conveyed for various purposes specified, viz. for the relief of the poor, the repair of the church and highways, and of a particular bridge, and to pay the 15ths when it should be required to defray the expenses of soldiers. Thus all the objects which I have enumerated were objects of a public nature, to which these trustees were appointed to take certain estates and apply their produce to them. It has been considered for many years that under that part of the trusts which enabled the trustees to apply these funds for the relief of the poor, they were at liberty to apply part of the funds to instruct the poor children of the parish; a school-house has been accordingly built, and those poor children have been instructed at that school. We are of opinion that that application of the funds comes within the terms of the trusts; and that where trustees are appointed to apply funds for the relief of the poor of a parish, they may, in the exercise of their discretion, apply those funds, or part of them, for the education of the poor children of the parish; that being an applying the funds for the relief of the poor within the language of an instrument of this description. Now in this case, at the time when the plaintiff was appointed, there were seven trustees; those seven trustees met for the purpose of electing a schoolmaster; at that meeting five of the trustees concurred in the appointment of the plaintiff, two dissented, but they did nothing upon that dissent. It was stated merely in evidence that five concurred and two dissented; but the latter did no act, as it appears in the evidence, consequent upon that dissent. It is unnecessary however in the view which we take of the subject to say whether or not that is to

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be considered as a concurrent election by the seven, because we are of opinion that in a case of this description when all the trustees were assembled for the purpose of making the election, and the majority of them so assembled concurred in the appointment of a schoolmaster, the act of the majority in that respect is to be considered as the act of the whole body. This is a trust of a public nature, and we are of opinion that when trustees are appointed for the purpose of performing a trust of a public and general nature like this, the act of the majority is the act of the whole. In the case of *Grindley* v. *Barker* (*a*), C. J. *Eyre* says, that "where persons are entrusted with powers of a general nature, and they all meet for the purpose of performing their duty, the act of the majority is the act of the whole." That case was recently cited in *Cortis* v. *Kent Water Works Company* (*b*), by one of the learned judges, and was adopted by him and apparently by the whole court. We are of opinion that this is a public trust, or a trust of a public nature, namely, a trust to apply funds for the repair of the church, and for other subjects in which the whole parish were interested; therefore we think it comes within the principle to which I have referred. But it was said at the bar that the principle only applies to cases where the trustees are appointed under some public authority, as under an act of parliament, or some public body. We are of opinion that it is not subject to that limitation, and in fact in the *Skipton School* case, *Withnell* v. *Gartham* (*c*), the charity was founded, and its officers were appointed not by any public authority, but, as in the present case, by an individual. It is true in that case the churchwardens and vicar for the time being were the trustees, and that the churchwardens usually acted by a majority; but that

(*a*) 1 B. & P. 256. (*b*) 7 B. & C. 314. (*c*) 6 T. R. 388.

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was merely made use of as a circumstance from which it was to be inferred that the intention of the donor was that the act of the majority should bind the whole, and should be considered as the act of the whole body. Other circumstances were also there relied upon, namely, that the objects of the trust would be defeated if one dissenting trustee could prevent the application of the funds in the manner directed by the trusts. Now that would apply equally in this case; and, considering the nature of the trusts, we are of opinion that it was the intention of the founder, and fairly to be collected from the objects he had in view, that the act of the majority of the trustees should bind the rest.

The next question that arises for consideration, arises on the 9th and last issues, being whether the master was duly and properly dismissed. Now the dismissal was in this form; there was no public meeting, nor any declaration by a majority assembled at a public meeting, that the schoolmaster should cease to act in that situation; but five out of the trustees, not assembled in any formal manner, gave notice that the schoolmaster should within a certain time retire from his office. In the first place, at the time when that notice was given, there were ten trustees, so that the persons who gave notice did not even constitute a majority of the whole body. In the next, even if they did constitute a majority of the whole body, it is the whole body that is to dismiss, and not a majority of it. So that if there is a meeting, and a majority are for dismissal, then the declaration of the majority is not merely the declaration of the majority, but of the whole body, which whole body does in fact dismiss. Therefore in a case of this description, where there was no meeting, and where five insulated individuals gave their opinion, or said that the dismissal should take place within a short time, or that the party should cease to

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act as schoolmaster, we are of opinion that that is not a valid dismissal within the meaning of this trust. Both notices stand on the same footing, and are governed by the same principles.

Though I have hitherto stated the second question to relate to the dismissal of the schoolmaster, the actual terms of the last issue are "whether the interest and right of possession were lawfully put an end to and determined before the trespass complained of." And it becomes material therefore to consider next what his interest and right of possession were. He was appointed at a salary of 40*l.* a year, and with permission to occupy the dwelling-house, and a right to occupy it as long as he continued schoolmaster. That occupation was incident to his appointment of schoolmaster, and he had no interest in the house distinct from his interest of the appointment of schoolmaster; as soon therefore as he was properly removed from his office of schoolmaster his right to possess and occupy that house ceased; and therefore in deciding that he was properly removed from his office of schoolmaster, we should in effect decide that his interest and right of possession in the premises had ceased. Another question however arose out of the form of the issue, which was this, that the assembly did not duly appoint the plaintiff upon the terms, among others, that he should hold till dismissed by a majority; and in that issue and upon the replication nothing is stated with respect to the trustees, but it is merely stated that the parties were seised, without stating that they were seised as trustees. However we do not conceive that that makes any difference on the evidence produced. The trust deed under which the schoolmaster was appointed was produced, or assumed to be produced. That deed limits the nature of the appointment, and regulates also the manner in which he might be dismissed; and the evidence under it is not at all inconsistent with the statement of the title, and the right

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stated on the face of the replication. The legal title stated in the replication corresponds entirely with what appears in evidence. We are of opinion therefore that this ranges itself precisely within the decision on the former point, and that though on the face of the replication they are not stated to be seised as trustees, yet sufficient appears for this purpose by the production of the trust deed upon the trial, and the nature and limitation of the appointment, and the right of removal as evidenced by that trust deed. The court entertain no doubt but that an appointment to the situation of schoolmaster may be made without writing.

The remaining question arose upon the motion in arrest of judgment. The plea was *liberum tenementum*, the replication was *liberum tenementum* (in the same persons), to which was added a deduction of title; and the question is, whether after verdict that is sufficient, without having first alleged that they were seised in fee, and then after deducing a regular title, that the trustees who were so seised in fee regularly appointed, by a majority, the schoolmaster? But instead of stating a seisin in fee the premises were stated to be the soil and freehold of certain trustees, and that those trustees appointed previously to the election by the majority. It was not disputed, I think, at the bar, and it is quite clear that to have stated a seisin would have been sufficient after verdict without stating a seisin in fee. A party may be seised in freehold, which would have been sufficient after verdict. We think therefore that it having been stated that it was their soil and freehold in the replication, is cured by verdict as much as it would have been cured if a general seisin had been stated, without stating a seisin in fee. We are of opinion therefore that the rule should be discharged.

Rule discharged.

See *Attorney-General* v. *The Master of the Grammar School of Anthony Browne, in Brentwood, Essex, and Others*, 3 B. & Adol. 59.

## HUME and Others *against* BOLLAND and Others.

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One of several partners in a banking house, being also a co-trustee with other persons, such trustees being entitled to certain stock and the dividends thereon, forged a power of attorney to transfer the stock, which was sold and transferred under such forged power. After the transfer he made false entries in the partnership books, by which he regularly credited the trustees with the supposed dividends upon the stock. It did not appear that any account recognizing such false entries had been delivered to the trustees

BY an order of the Lord Chancellor dated 12th *February* 1832, in the matter of *W. Marsh* and Others, bankrupts (*a*), the following case was submitted for the opinion of the judges of this court:—

By an indenture bearing date 9th *August* 1820, and made between the late Colonel *Bellis*, of the one part, and *Henry Fauntleroy*, *James Deacon Hume* and *John Goodchild*, of the other part; it was declared that the said *H. Fauntleroy*, *J. D. Hume* and *J. Goodchild*, and the survivors of them, should stand possessed of the several sums of 46,000*l.* 3 per cent. reduced annuities; 5300*l.* 4 per cent. consolidated annuities; 17,500*l* .navy 5 per cent. annuities, which by an act of parliament have been since converted into 18,375*l.* new 4 per cent. annuities; and 10,000*l.* 3 per cent. imperial annuities, then standing in their joint names in the books of the governor and company of the bank of *England*, and of the dividends thereof, upon such trusts as Colonel *Bellis* should appoint, and in default of appointment, upon trust to pay the dividends to Colonel *Bellis* during his life, and after his decease upon certain trusts for the benefit of his widow and children. And by another deed bearing date *July* 26th, 1822, and indorsed on the said deed of *August* 9th, 1820, and made between the same

(*a*) The principal case was heard in *Michaelmas* term 1832.

by the partners before their bankruptcy. They however paid checks drawn on the credit of the dividends supposed to have been received, and which checks were duly paid:—Held, that although the entries in the books, coupled with the payments on account of the supposed dividends, were primâ facie evidence against the banking firm that they had had and received the amount of the dividends to the use of the plaintiffs (the surviving trustees);—yet that inasmuch as the transfer under the forged power was absolutely void, the property in the stock and dividends due thereon remained in the trustees; and that as they were entitled to receive the dividends at the bank of *England*, they could not treat the amount of those dividends as money had and received to their use by the defendants (the bankers), although the bankers might be liable to an action on the case for deceit, in which damages might be recovered in proportion to the injury arising from their untrue representation, that they had received the dividends for the use of the trustees.

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parties, it was declared that the said trustees should stand possessed of 6000*l.* 3 per cent. consols, then also standing in their said joint names in the said books of the governor and company of the bank of *England*, upon the same trusts as were declared by the said indenture of *August* 9th, 1820. The said *H. Fauntleroy* was a partner in the firm of Messrs. *Marsh, Stracey, Graham* and *Fauntleroy*, who carried on the trade of bankers, and who were the bankers of the aforesaid trustees, and during the lifetime of the said Colonel *Bellis*, the amount of the half-yearly dividends on the above-mentioned amount of stock were from time to time regularly carried to the account of the said Colonel *Bellis* in the books of the said firm, and drawn for and received by him. The said Colonel *Bellis* died on *January* 23, 1824, without having exercised any of the powers of appointment given him by the said deeds; and on his death a new account was opened in the books of the said banking-house, entitled "*Trustees of Bellis.*" This account was credited, as hereinafter set forth, with several sums of money as dividends on the aforesaid amounts of stock, as the same respectively became or would have become due in the respective months of *April* and *July* 1824; and the said trustees were likewise from time to time debited in the said books to the said account with several sums of money paid to the children of the said Colonel *Bellis*, in execution of the trusts of the said deeds. On *September* 16th, 1824, a commission of bankrupt was issued against the said Messrs. *Marsh, Stracey* and *Graham;* and on the 29th day of *October* 1824 a further commission was issued against the said *H. Fauntleroy*, upon which said commissions the said parties were duly declared bankrupts; and at the date and issuing of such commissions the said account stood in the books of the said Messrs. *Marsh* and Co. in manner following, that is to say:—

TRUSTEES OF BELLIS.

| 1824. | £. | s. | d. | 1824. | £. | s. | d. |
|---|---|---|---|---|---|---|---|
| April 29th, Frances Bellis . . . | 10 | 0 | 0 | April 9th, Div. £5,300. 4 per cent. | 106 | 0 | 0 |
| Eliza Bellis . . . | 10 | 0 | 0 | Do. £46,000. Red. | 690 | 0 | 0 |
| 30th, B. P. Bill . . . . | 20 | 0 | 3 | | | | |
| £756. | 40 | 0 | 0 | | 796 | 0 | 0 |
| June 16th, Stamps . . . . . | 0 | 4 | 6 | July 9th, Do. £10,000. Imp. 3 p.ct. | 150 | 0 | 0 |
| Emily Bellis . . . | 20 | 0 | 0 | Do. £18,375. 4 per cent. | 367 | 10 | 0 |
| Do. . . . . | 20 | 0 | 0 | Do. £6000. 3 per cent.. | 90 | 0 | 0 |
| Frances Bellis . . | 20 | 0 | 0 | | | | |
| Aug. 10th, Emily Bellis . . . | 20 | 0 | 0 | | | | |
| Frances do. . . . | 95 | 6 | 0 | | | | |
| Eliza do. . . . . | 10 | 0 | 0 | | | | |
| Stamp . . . . . | 0 | 3 | 0 | | | | |
| £1177 16 6 | 225 | 13 | 6 | | | | |
| Balance . . . . | 1177 | 16 | 6 | | | | |
| Carried forward . | £1403 | 10 | 0 | | £1403 | 10 | 0 |
| | | | | 1824. | | | |
| | | | | Sept. 11th, Balance brought forward . . . . . | 1177 | 16 | 6 |

And a copy of this account afterwards, and after the death of the said *H. Fauntleroy* on 30th *October* 1824, was rendered on demand by the assignees of the said Messrs. *Marsh* and Co. to the said surviving trustees, and is in the words and figures following, that is to say:

THE TRUSTEES OF BELLIS (in account with) MARSH & Co.

| 1824. | £. | s. | d. | 1824. | £. | s. | d. |
|---|---|---|---|---|---|---|---|
| April 29th, Frances Bellis . . | 10 | 0 | 0 | April 9th, Div. £5,300. 4 per cent. | 106 | 0 | 0 |
| Eliza do. . . . . | 10 | 0 | 0 | Do. £46,000. Red. 3 p. ct. | 690 | 0 | 0 |
| 30th, B. P. Bill . . . . | 20 | 0 | 0 | July 9th, Do. £10,000. Imp. 3p.ct. | 150 | 0 | 0 |
| June 16th, Stamps . . . . | 0 | 4 | 6 | Do. £18,375. 4 per cent. | 367 | 10 | 0 |
| Emily Bellis . . . | 20 | 0 | 0 | Do. £6000. 3 per cent. | 90 | 0 | 0 |
| Do. . . . . | 20 | 0 | 0 | | | | |
| Frances Do. . . . | 20 | 0 | 0 | | | | |
| Aug. 10th, Emily do. . . . . | 20 | 0 | 0 | | | | |
| Frances do. . . . | 95 | 6 | 0 | | | | |
| Eliza do. . . . . | 10 | 0 | 0 | | | | |
| Stamp . . . . . | 0 | 3 | 0 | | | | |
| Sept. 13, To balance . . . | 1177 | 16 | 6 | | | | |
| | £1403 | 10 | 0 | | £1403 | 10 | 0 |
| | | | | Sept. 13th, By balance . . | £1177 | 16 | 6 |

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The *Frances*, *Elisa*, and *Emily Bellis*, named in such account, were children of the said Colonel *Bellis* entitled under the said indentures.

From the time of the death of the said Colonel *Bellis*, no sums of money were received by the said Messrs. *Marsh* and Co. from the bank of *England* in respect of dividends upon any of the above-named sums, except one sum of 90*l.* which was received by them on *July* 9th, 1824, in respect of the sum of 6000*l.* 3 per cent.; and all the principal sums of money above mentioned (except the said last mentioned sum of 6000*l.* 3 per cents.) had been transferred or pretended to be transferred during the lifetime of the said Colonel *Bellis*, without his knowledge or the knowledge of the said *J. D. Hume* and *J. Goodchild*, by the instrumentality of the said *H. Fauntleroy*, into the names of other persons as purchasers thereof for valuable considerations, by means of powers of attorney purporting to have been executed by the said *H. Fauntleroy*, *J. D. Hume* and *J. Goodchild*, but of which the several signatures of *J. D. Hume* and *J. Goodchild* were forged by the said *H. Fauntleroy*.

The said *H. Fauntleroy*, after the sale or pretended sale of the said principal stocks, entered in the day books of *Marsh* and Co. the amount of the half-yearly dividends thereof, on the days when they would respectively have become due and payable, as if he had duly received the same at the bank of *England*, together with the dividends of other persons having accounts with the said bankers; and such amounts were in the ordinary course of business regularly posted from such day book to the credit of the said trustees, by the clerks of the said Messrs. *Marsh* and Co. No part of the money received by the said *H. Fauntleroy* in the sale or pretended sale of the aforesaid amounts of stock, was received by or carried to the credit of the said trustees or either of them.

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The question submitted to the court is, whether, at the date and suing forth of the said commissions of bankrupt against the said *W. Marsh*, *J. H. Stracey*, *G. E. Graham*, and *H. Fauntleroy*, bearing date respectively the 16th day of *September* 1824, and the 29th day of *October* 1824, the said bankrupts were indebted to the said *H. Fauntleroy*, *J. D. Hume*, *J. Goodchild*, as the trustees of the said Colonel *Bellis* under the said hereinbefore mentioned deeds in any and what sum of money? And in considering the said question no objection of merely a formal nature is to be taken on the ground that the said *H. Fauntleroy* was interested as a trustee jointly with the said *J. D. Hume* and *J. Goodchild*, and also a partner with the said *W. Marsh*, *J. H. Stracey*, and *G. E. Graham*.

*Adams* Serjt. for the plaintiffs. The trustees of *Bellis* are entitled to prove against the estate of *Marsh* and Co. for 1177*l.* 16*s.* 6*d.*, the balance of dividends due on *September* 13, 1824, as for money had and received to their use by *Marsh* and Co. the bankrupts. *Sandilands* v. *Marsh* (*a*) shows that the act and assurance of one partner made with reference to business transacted by the firm, will bind the other partners, though made out of the regular course of that business, if known to or acted on by them afterwards. Here, besides the credit given to the trustees by *Marsh* and Co. for the dividends in arrear on the other stocks, it appears that *Marsh* and Co., on 9 *July* 1824, actually received from the bank of *England* a dividend of 90*l.* on the 6000*l.* 3 per cent. stock, after the fraudulent transfer of the rest.

[Lord *Lyndhurst* C. B. The trustees received the dividends from the banking-house, after their stock had

(*a*) 2 B. & Ald. 673; *Rapp* v. *Latham*, id. 795.

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been transferred by *Fauntleroy*, in the same way as they had done before; and had reason to think that *Marsh* and Co. had received the dividends. They, therefore, supposed themselves precisely in the same situation as before, and nothing led them to suspect what had happened. The case does not state whether or not a sum on the credit of that stock was paid into the city bankers of *Marsh* and Co. or to the trustees.]

In *Shaw* v. *Picton* (*a*) the agent for both grantor and grantee of an annuity delivered to grantee an account, showing that he, the agent, had received certain payments on account of the annuity, and giving the grantee credit for them in that account, though he had not in fact received any of them. There he was held bound by the account.

[*Bayley* B. There *Howard* pretended that he had received payments on account of the annuity, and the account by which that fact was made to appear was actually delivered to the annuitant. Here the question is, how matters stood at the time of the bankruptcy? For the act of the assignees of *Marsh* and Co., in delivering the account, cannot create a debt. Lord *Lyndhurst* C. B. The whole amount received by checks was 225*l*., which was much less than the supposed dividends then credited, and also larger than the *April* dividend on the 6000*l*. 3 per cents. actually received. The question here is, Whether the circumstances are such as amount to a representation by the banking-house that they had received payment of the dividends as usual, so as to deceive the trustees?]

The time of the transfers by *Fauntleroy* does not appear, but it was before Colonel *Bellis*'s death. Then did not *Marsh* and Co. make themselves equally liable by paying cheques drawn on the credit of their receipt

(*a*) 4 B. & Cr. 715. See *Shaw* v. *Dartnall*, 6 B. & C. 56, 65; *Shaw* v. *Woodcock*, 7 B. & C. 73; *Williamson* v. *Gould*, 1 Bing. 191.

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of those dividends for several years, as if a written account had been furnished by them? They had no other funds but the dividends to pay the cheques from.

*F. Kelly* for the assignees of *Marsh* and Co. The first question is, Whether entries made in the books of a banking house by a partner in the concern, but which were false in themselves in crediting customers with dividends never actually received, will bind the other partners? The cases in which partners have been estopped from denying the act of a partner are distinguishable from this; for these plaintiffs must show that at the time of the bankruptcy the trustees could have sued the partners (*Faunt leroy* being one) in an action for money had and received. The admissibility of the entry in evidence must be first considered. The party who made the fraudulent entries was in his life-time a co-trustee with the present plaintiffs; had he survived them, he only could have sued *Marsh* and Co., and his only evidence against them would have been his own forged entries acknowledging their receipt of the dividends. [Lord *Lyndhurst* C. B. Objections of a formal nature are excluded by the terms of the case.] Those entries, made without knowledge of the other partners, cannot now operate as acknowledgments by them of having received what never was received at all, and in absence of proof that in consequence of them any account was rendered by them to the trustees of *Bellis*. In *Straton* v. *Rastall* (*a*) the fact that a surety for payment of an annuity had not received any part of the consideration money was admitted to rebut a receipt for it, though signed by himself and the grantor. In *Skaife* v. *Jackson* (*b*) Lord *Tenterden* said, "a

(*a*) 2 T.R. 366, and *Grose* J. id. 371.

(*b*) 3 B. & Cr. 421.

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receipt was not a discharge of the action for money had and received, and is nothing more than a *primâ facie* acknowledgment that the money has been paid." Then the situation of the parties was not altered, nor can be implied to be so altered, by any representation made or act done by *Marsh* & Co., *Heane* v. *Rogers*(*a*); for this entry was not made known to the parties entitled, by delivery to them of any corresponding account.

[*Bayley* B. The effect of the payments on account to Colonel *Bellis*'s children after his death, was the same whether these payments were made by *Marsh* and Co. or *Fauntleroy* himself. There is no suggestion on the case that there was any other fund or account between them and the trustees. Lord *Lyndhurst*. If the other trustees had wanted money, they might have discovered the fraud by applying at the bank to receive the dividends themselves. So if they had called on *Marsh* and Co. for a sum, and they had refused to pay it, alleging that they could not receive the dividends.]

Had that discovery taken place it would not have prejudiced or altered their rights. The stock having been sold under a forged power of attorney, the transfer is absolutely void, and the trustees are still holders of the stock, and entitled to receive the dividends due from the bank of *England*. For in *Davis* v. *Bank of England*(*b*), it was held that the property in stock transferred under a forged power did not pass from the owner, and his right to dividends on it was held to remain. So that this money being in the hands of the bank, who hold it for these plaintiffs, cannot be recovered by them against *Marsh* and Co. as money had and received to the use of the trustees, *Marsh* and

(*a*) 9 B. & Cr. 586.

(*b*) 2 Bing. 393. That case was reversed in K. B. 5 B. & C. 185, on the technical ground that the declaration did not show that the dividend claimed had ever been issued by the government to the bank.

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Co. never having received it (*a*); though there might have been a good cause of action in case against them as agents for any damages really sustained by the misrepresentations of the bankers.

*2*dly. Can the surviving co-trustees of *Fauntleroy* recover at law against the assignees of the firm of which he also was a partner?

*Bayley* B. cited *Rose* v. *Poulton* (*b*).

[Lord *Lyndhurst*. That objection is excluded by the terms of this case. The real question is, whether the trustees are still, in point of law, possessed of the stock, and entitled to receive the dividends at the bank of *England*. If they are, their situation is not altered, so as to enable them to maintain an action for money had and received for the amount of the dividends. If they have sustained damages by the representation of the defendants that they had received the dividends, they may maintain an action on the case, in which the damages will be unliquidated, and bear proportion to the injury; but the action for money had and received to recover the amount of the dividends, is inconsistent with the dividends being at the bank and the property of the plaintiffs.]

*Adams* Serjt. in reply. The argument that the plaintiffs have a remedy against another party would have applied in *Shaw* v. *Picton*, where the annuitants might have recovered the rents themselves against the tenants, or might have sued the agents by action for money had and received.

[Lord *Lyndhurst*. Money had and received could not have been brought for sums which the principal had himself received from the agent. *Bayley* B. It

(*a*) See *Wharton* v. *Walker*, 4 B. & C. 163. *Spratt* v. *Hobhouse*, 4 Bing. 173. *Fairlie* v. *Denton*, 8 B. & C. 395.

(*b*) 2 B. & Adol. 822.

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may be that *Marsh* and Co. could never enforce the repayment of the monies they advanced to the trustees of *Bellis*, viz. *225l.*; for they paid themselves by crediting them with other and larger sums, thereby admitting that they had them in hand: but how are the trustees entitled to the money which *Marsh* and Co. never received, and have never paid? In *Shaw* v. *Picton*, the assignees of *Howard* and *Gibbs* sought to recover back money which the bankrupts had in fact paid; and that case establishes, that if an agent represents himself to have received his employer's money, and pays that money to him in such a manner as to make no difference to him, the agent cannot recover it from his principal. It is clear that *Marsh* and Co.'s assignees could not recover back payments made by those bankrupts (*a*), but whether the trustees entitled to the stock could recover back dividends which the bankrupts had not received, is a very different question. In *Shaw* v. *Picton*, the agents, *Howard* and *Gibbs*, might have sued for the rents in *Picton's* name.]

When the duty of an agent has been to receive money, and he has by entries on his accounts, &c. induced the principal to believe that he has received it, can the agent set up his neglect of duty as a defence to an action for the money as had and received by him to the use of the principal?

[*Bayley* B. If the situation of the principal is altered, by the agent's improperly representing that he had been receiving rents, the contrary being the fact, an action on the case for damages would lie against him, but the amount of damages would depend on the state of solvency of the tenant.]

The following certificate was afterwards sent:—

(*a*) And see *Skyring* v. *Greenwood*, 4 B. & C. 281.

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This case has been argued before us by counsel; we have considered it, and are of opinion, that at the date and suing forth of the said commissions of bankrupt against the said *W. Marsh*, *J. H. Stracey*, *G. E. Graham* and *H. Fauntleroy*, the said bankrupts were not indebted to the said *H. Fauntleroy*, *J. D. Hume* and *J. Goodchild*, as the trustees of the said Colonel *Bellis*, in any sum of money; and in considering the second question we have laid out of the case the formal objection that the said *H. Fauntleroy* was a trustee on the one hand, and a partner in the house of *Marsh* and Co., on the other.

LYNDHURST.
J. BAYLEY.
J. GURNEY.

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*IN THE EXCHEQUER CHAMBER.*

## HARVEY *against* FRENCH.

(In Error from the Court of Exchequer of Pleas.)

Before Lord TENTERDEN C. J.—TINDAL C. J.—LITTLEDALE, J. PARKE, and TAUNTON, Justices of K. B. —ALLAN PARK and BOSANQUET, Justices of C. P.

A count laying the following libel to have been published of and concerning the plaintiff, is good without introductory averment or innuendo, "Threatening letters. The *Middlesex* grand jury have returned a true bill against a gentleman of some property named *French*," (meaning the said plaintiff.)

Where written or printed matter in itself imports a libel on the plaintiff, no statement of extrinsic circumstances, by way of inducement, is necessary; and innuendos improperly enlarging the sense will be rejected as surplusage.

The heading prefixed to a paragraph will be read with the rest of it, and the whole taken in the ordinary meaning of the words.

CASE. The first count of the declaration stated that the defendant did falsely, &c. compose, print and publish, and cause and procure to be composed,

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&c. in a certain public newspaper called *The Globe and Traveller*, of and concerning the said plaintiff, a certain false, scandalous, malicious, and defamatory libel, containing, amongst other things, the false, &c. matter following of and concerning the said plaintiff; that is to say, " Threatening Letters. The *Middlesex* grand jury have returned a true bill against a gentleman of some property named *French*," (meaning the said plaintiff) " for the alleged offence of sending an anonymous letter to Mr. *Trotter*, the brother-in-law of Mr. *Sinclair* of *Drury Lane Theatre*, containing a threat that the writer would cause him to be assassinated, by shooting him with a pistol. Besides the letter which is the subject of this indictment, both Mr. *Sinclair* and Mr. *Trotter* have been pestered with numerous others, the authors of which are unknown, but all of which contain threats of destroying one or both of those gentlemen, and of setting fire to their joint property, the *Tivoli Tea-Gardens* at *Margate*. The whole contents of these letters are written in capital letters, they are evidently in a disguised hand and abound with mis-spellings, but many of them are such as an ignorant man would not be likely to fall into, being capricious and not according to the pronunciation of the words. Another peculiarity, and which more than any other seems to show they are not the production of such a person is, that the capital ' V ' is repeatedly used instead of the ' U.' The tops, bottoms, and margins of the letters are ornamented with coffins, gibbets, and a variety of other hieroglyphics, apparently intended to represent the destruction of property by fire. The letters are addressed in the common writing style, the address runs thus:—' Mr. *Sinclare*, Box Offis, *Drury Lane Theater*':" thereby meaning that the said plaintiff had been and was guilty of feloniously writing and sending threatening letters, contrary to the

form of the statute in such case made and provided. The 5th count, after a similar commencement, thus stated the libel:—" Threatening Letters. The *Middlesex* grand jury have returned a true bill against a gentleman of some property named *French*," (meaning the said plaintiff,) with this that the said plaintiff will verify that the said defendant thereby then and there meant to insinuate and have it understood that the said plaintiff had been suspected to have been and had been guilty of the offence of sending a letter, without any name or signature thereto subscribed, directed to one —— *Trotter*, threatening to kill and murder the said —— *Trotter*, a subject of the realm, with a view and intent to extort money from the said —— *Trotter*. The 6th count was similar.

The plaintiff had a verdict upon the whole declaration, and took his damages generally.

*Platt* for *Harvey*, the defendant below (*a*). Where the libellous quality of a publication is derived from extrinsic facts, the connection with them must appear on the face of the declaration, first, by introductory averment; secondly, by stating that the libel related to the facts averred, and was published of and concerning them; and, thirdly, by innuendo in explanation of them (*b*). Here the 5th and 6th counts are bad, for want of introductory averment that a letter had been written to Mr. *Trotter*, threatening to murder him, with intent to extort money, so as to found an averment that the libel was published as well of and concerning that letter as of and concerning the plaintiff.

(*a*) *i. e.* the plaintiff in error. It seemed convenient, to avoid complexity by reporting this case as if it had been argued and adjudicated while in its original shape.

(*b*) See *Goldstein* v. *Foss*, 6 B. & C. 154; *S. C.* 4 Bing. 489; *Hall* v. *Blandy*, 1 Y. & J. 480.

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In the absence of such inducement the innuendo cannot extend or do more than explain the meaning of the libel, *Barham*'s case (*a*), *Rex* v. *Horne* (*b*), *Holt* v. *Scholefield* (*c*), *Craft* v. *Boite* (*d*), *Williams*'s note.

Where extrinsic matter is necessary to explain written slander, it should be stated to have been published "of and concerning" the facts averred in the introductory allegation; for the same reason that in an action for words the colloquium must be laid respecting such matter. In *Hawkes* v. *Hawkey* (*e*), though the inducement stated that plaintiff had put in his answer to a bill, the count was held bad for not averring the colloquium to have taken place respecting that answer; and the innuendo, though large enough to impute the crime, was held insufficient to refer the words spoken to the introductory matter without such a colloquium. In *Rex* v. *Marsden* (*f*), the words "of and concerning" the party libelled, are stated by the C. J., on the authority of *Rex* v. *Horne*, to be very material, and as well in civil as criminal pleadings in slander. But in these counts the imputations are not laid of and concerning the letter, though that is most important, as imputing the offence to the plaintiff.

But if, in the absence of prefatory averment, this publication is sufficiently stated to be of and concerning the plaintiff, then after stripping these counts of the innuendo, is the paragraph libellous? The heading applies to no matter subsequently alleged. Then the statement as to a true bill being returned, though in juxta position with it, is wholly disconnected from it, and is not ex necessitate libellous; for a bill might

(*a*) 4 Rep. 10. (*b*) Cowp. 683.

(*c*) 6 T. R. 691. (*d*) 1 Saund. 243, n. (4).

(*e*) 8 East, 427. See *Savage* v. *Robery*, Salk. 694, there cited by Lord *Ellenborough*.

(*f*) 4 M. & S. 168.

have been found for not repairing a bridge or a nuisance.

[*Tindal* C. J. The letter might threaten to beat the plaintiff or to bring an action against him. *J. Parke* J. Your argument must have been the same if "Murder" had been the heading. The case of *Corbett* v. *Hill* (*a*) shows that an innuendo may be rejected if the matter is clear without it, and surely this is so here. The finding a bill of indictment for sending threatening letters, imports that they were unlawful threatening letters.] In *Lewis* v. *Clement* (*b*) the alleged libel was a narrative of proceedings on a trial. There was a heading "Shameful conduct of an attorney," which was not included in the pleas of justification. The jury found for the defendant on those pleas, but for the plaintiff on the general issue. A rule was granted for judgment *non obstante veredicto*, in resisting which it was argued, that the libel having been justified according to the truth, the heading was a comment borne out by the facts subsequently found to be a justification; but the court held that the prefatory statement could not be so explained, and the plaintiff had judgment. As that decision proceeded on the separate nature of the heading, it applies in favour of this defendant.

*White* for *French* the plaintiff below (*c*). The terms of the innuendo amount to a positive averment; but rejecting it as an innuendo, what else could the plaintiff mean by these expressions but to charge the plaintiff with some infamous crime? See per Lord *Ellenborough*, *Woolnoth* v. *Meadows* (*d*). Though it is not alleged that these words were understood by the readers of the newspaper in the imputed sense, the averment that the defendant meant to insinuate that the plaintiff had been guilty of sending an anonymous letter with intent to ex-

(*a*) Cro. El. 609. 1 Bac. Ab. tit. Slander (S 4.) (*b*) 3 B. & Ald. 702.
(*c*) *i. e.* defendant in error. (*d*) 5 East, 463.

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tort money, is sufficient; for the words are calculated to convey to the mind of an ordinary hearer an imputation on the plaintiff of that offence. See per Lord *Ellenborough* in *Roberts* v. *Camden* (*a*).

The whole publication must be read together, and so read is slanderous; for a true bill could only have been found against the plaintiff for some indictable offence. Now in order to make written slander actionable, it is enough if, by charging misconduct of a gross, illegal or illiberal nature, it tends to bring the party into ridicule, odium or contempt. *Bac. Ab.* tit. Libel (A 2.), *Clement* v. *Chivis* in error (*b*), *Woodward* v. *Dowsing* (*c*), or imputes want of feeling, or indecorum, thereby tending to degrade, *Churchill* v. *Hunt* (*d*). These expressions in their common meaning impute, that a bill had been found against the plaintiff for sending a threatening letter, and are actionable without any innuendo. *Smith* v. *Carey* (*e*). In *Hawkes* v. *Hawkey*, and *Holt* v. *Scholefield*, the words were not actionable without averring extrinsic circumstances.

*Platt* replied.

Lord TENTERDEN C. J.—We are of opinion in this case, that the innuendo at the end of the 5th and 6th counts is not warranted by the previous words of them; for all that goes before is, that a threatening letter had been sent by the plaintiff; but it by no means follows that a threatening letter had been directed to any person named *Trotter*, or that it contained any threat to kill and murder the person to whom it was addressed. Now unless these counts can be sustained without the innuendo, they would be bad, and the judgment ought to be reversed; but we are of opinion that they may be sustained after having rejected

(*a*) 9 East, 95, 96. (*b*) 9 B. & C. 172. (*c*) 2 M. & R. 74.
(*d*) 2 B. & Ald. 685. 1 Chit. R. 490. (*e*) 3 Campb. 461.

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that innuendo. It would then read thus, "Threatening Letters. The *Middlesex* grand jury have returned a true bill against a gentleman of some property, named *French*" (meaning the said plaintiff).

It was contended for the defendant, that the court cannot intend that the bill found by the grand jury is a bill of indictment for sending threatening letters; but it is agreed that the court will understand these words in the same sense which its members would themselves ascribe to them, if they had read the paragraph in the ordinary way in any other place. The heading is Threatening Letters. Now the prefacing the statement with those words cannot be intended to mean otherwise but that the bill had been returned found by the grand jury for sending threatening letters; and the matter cited by my brother *Parke* from *Croke Elizabeth* is an authority to show that a bill of indictment for sending a threatening letter imports an unlawful threatening letter.

Judgment affirmed.

*The reader is requested to correct his copies of Vol. II. Parts I. and II. by the following*

## ERRATA AND ADDENDA.

### Vol. II. Part I.

In Table of Cases, *after* " Anonymous (*security for costs,*)" *for* " ib. n." *read* " 167, n."

——————— *dele* two lines following " Spicer v. Todd."

Page 76, line 7 from bottom of text, *after* " and" *read* " the plaintiff then."

—— 102, l. 12, *after* " the" *read* " grand-"

—— 107, note (*c*), *add* " 2 Bla. Com. 336."

—— 112, *add* " See 2 Wils. R. 69."

—— 123, note (*b*), *for* " 1 B. & *Adol.*" *read* " 1 B. & *Ald.*"

——— note (*c*), "*for* 230," *read* " 250."

—— 136, note (*a*), " 2 B. & P." is the right reference. It is understood that some copies have it " 1 B. & P."

—— 158, *add* to *Fenton* v. *Warre*, " But the subsequent opinion of all the judges, after having met on the subject, was, that the *notice* of bail should state the place and places of residence of the bail during the last six months, and not leave it to inference. Per *Vaughan* B. January 30, 1832. *R. V. Richards* in support of the bail, *Wyburn* against them."

—— 159, 2d line of " Hitchcock v. Badham," and in the marginal note, *dele* " service of the venire and."

——— 12th line, *for* " there" *read* " at the wife's house."

—— 161, S. P. Hart v. Myerris, Exch. Mich. 1832.

—— 163, *after* last line *add* " See 1 H. Bla. 354, and *Simpson* v. *Lowthwaite*, H. 1832, 3 B. & Adol. 226."

### Part II.

—— 172, *add to three last lines of text*, " In *Morris* v. *Bell*, Easter 1832, *Richards* moved to rescind an order made by Lord *Tenterden*, and a rule nisi was granted."

—— 173, n. (*a*), *add* " contrà in C. P. *Doe* d. *Prescott* v. *Roe*, 9 Bing. 104, T. 1832."

—— 214, *after* " Ilsley v. Ilsley," *add* " See *Manesty* v. *Stevens*, M. 1832, 9 Bing. 400."

—— 215, line 8 from bottom of text, *add* after " *qui tam*" " *Bayley* B. added."

—— 217, *after* " rule absolute," *add* " See 9 Bing. R. 81, T. 1832."

—— 221, last line of text, *after* " was," *add* " not."

—— 266, line 5 from bottom of text, *for* " stem" *read* " stern."

—— 279, *add* at end, " See Reg. Gen. Hil. 2 W. 4. Reg. I. § 32."

—— 288, *add* at end, " See now 2 W. 4. c. 39. s. 7."

—— 316, in *Tucker* v. *Colegate*, note (*a*), *add* " and see cases cited post. 496."

—— 317, *add* at end of *Kirk* v. *Almond*, " acted on *per cur.* *Baker* v. *Wells*, Exch. Mich. 1832."

—— 384, note (*b*), *add* " but *quære*, rule nisi only granted."

—— 385, *add* to *Morgan* v. *Harris*, " *Lambirth* v. *Roff*, 8 Bing. 411, E. 1832."

—— 397, line 5 from bottom, *for* " her" *read* " Jane Rees."

—— 398, last line, *after Whitcombe*, *add* " and *E. V. Williams*."

GLEADOW and Others, Executors of GLEADOW, *against* ATKIN and Another, Executors of ATKIN.

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One executor lent to his co-executor their testator's money, taking bond for the same payable to himself and his executors. The lender died, and afterwards the borrower: Held, 1st, that this was a misapplication of the assets, and therefore that the personal representatives of the lending executor might sue on the bond in order to exonerate their testator and themselves; 2dly, that the rule against circuity of action did not apply.

DEBT on bond, dated 17 *Sept.* 1805, in the penalty of 1000*l.* On oyer the bond appeared to be the joint and several bond of *John Atkin* deceased, and *William Boyle*, dated 17 *September* 1805, conditioned for the payment of 500*l.* to *Robert Gleadow* (the deceased), his executors, administrators, or assigns. Four pleas. That demurred to was as follows:—That on 14 *August* 1800, at &c. one *Cuthbert Thew* made his last will and testament in writing, and thereby gave and bequeathed unto the said *Robert Gleadow*, since deceased, and the said *John Atkin*, since deceased, and the survivor of them, and the executors and administrators of such survivor, all and singular his stock and implements in trade, the lease of his house, his ready money, bills, bonds, notes, mortgages, and other securities for money, debts due and owing to him, and all other his personal estate and effects whatsoever and wheresoever, (except his household furniture) to his wife for life, and subject to the payment to her of the sum of 160*l.* Upon trust (amongst other things) that they the said *Robert Gleadow* (since deceased) and *John Atkin* (since deceased), or the survivor of them, or the executors or administrators of such survivor, should forthwith, or so soon as conveniently might be after his decease, sell and dispose of such part of his personalty as was saleable, and collect and receive all his debts owing to him, and the money arising from such sale, with the debts to be received, and the amount of the monies owing to him on securities, with the ready money he might die possessed of; and he the said *Cuthbert Thew* willed and directed that his said trustees or the survivor of them, or the executors or

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administrators of such survivor, should put and place out at interest on real or such other sufficient securities as they should approve of, and pay the interest thereof as the same should accrue and be received by them, unto his said wife and her assigns during her natural life. And the said *Cuthbert Thew* by his said will appointed the said *Robert Gleadow*, since deceased, and the said *John Atkin*, since deceased, executors thereof. And the said defendants, executors as aforesaid, further say, that the said *Cuthbert Thew* afterwards, to wit, on the 1st day of *October*, in the year last aforesaid, died without altering or revoking his said will, and that thereupon the said *Robert Gleadow*, since deceased, and the said *John Atkin*, since deceased, took upon themselves the execution of the said trust in the said will mentioned; and that the said wife of the said *Cuthbert Thew* is still in full life, to wit, at the county aforesaid; and the said defendants, executors as aforesaid, further say, that the said sum of money in the said condition of the said writing obligatory mentioned, was part of the personal estate of the said *Cuthbert Thew* so as aforesaid bequeathed to the said *Robert Gleadow*, since deceased, and the said *John Atkin*, since deceased, and the survivor of them, and the executors and administrators of such survivor, to be by them applied according to the trusts of the said will, and was not the proper money of the said *Robert Gleadow*, since deceased; and that the said writing obligatory was given to secure the payment to the said *Robert Gleadow*, since deceased, as such trustee as aforesaid of the said money and interest, the same being money to be applied according to the trust specified in the said will of the said *Cuthbert Thew:* and the said defendants further say, that *Robert Gleadow*, in the said writing obligatory mentioned, afterwards, to wit, on the 17th day of *September* 1826, at the county

aforesaid, died, leaving the said *John Atkin*, since deceased, him surviving, whereupon all and singular the said personal estate by the said *Cuthbert Thew* bequeathed as aforesaid to the said *Robert Gleadow*, since deceased, and *John Atkin*, since deceased, and the survivor of them, and the executors and administrators of such survivor, became and was vested in the said *John Atkin*, since deceased, to be by him and his executors or administrators applied according to the said trusts of the said will of the said *Cuthbert Thew*. Verification, and prayer of judgment, &c. with profert of the letters testamentary of the said *Cuthbert Thew*, deceased, whereby it fully appears that the said *Robert Gleadow*, now deceased, and the said *John Atkin*, now deceased, in the lifetime of the said *Robert Gleadow*, were executors, and the said *John Atkin*, after the decease of the said *Robert Gleadow*, was executor of the last will and testament of the said *Cuthbert Thew*, who had execution thereof, &c. General demurrer.

*Alexander* in support of the demurrer. First, the plea is no answer to the declaration, for the bond sued on cannot be discharged at law, except by an instrument of as high a nature, *Davey* v. *Prendergrass*(*a*)

Secondly, the bond does not identify the plaintiff and defendant as co-executors, so as to let in the argument that no action will lie on account of their relation to

(*a*) 5 B. & Ald. 187; 6 Madd. R. 124, *S. C.* See also *Blake's case*, 6 Rep. 43 *b*; Vin. Ab. tit. Defeasance; *Preston* v. *Christmas*, 2 Wils. 86; *Rogers* v. *Payne*, *ib.* 376; *Hayford* v. *Andrews*, Cro. Eliz. 397; *Blennerhasset* v. *Pierson*, 3 Lev. 234; *Braddick* v. *Thompson*, 8 East, 344, 346; *Thompson* v. *Brown*, 4 Taunt. 671; *Sellers* v. *Bickford*, 8 Taunt. 30; *Lowe* v. *Eginton*, 7 Pri. 605; *Bulteel* v. *Jarrold*, 8 Pri. 467, (*Dom. Proc.*); *Rex* v. *Wait*, 1 Bing. 127; *Cupit* v. *Jackson*, Mac Lell. 495; *Gilbert* v. *Wetherell*, 2 Sim. & Stu. 254; *Heming* v. *Currey*, *id.* 311; 1 Dow R. (N.S.) 35, *S.C.*; *Rex* v. *Bingham*, 3 Y. & J. 103.

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each other at the time the security was given. Parties, though co-executors *quoad* suing for assets or part of the estate, may yet by deed create a liability in respect of their testator's effects, which would never have existed otherwise. They may thus effect a dissolution of their representative characters, and substitute themselves as individual parties; *Foster* v. *Allanson*(*a*). This bond would have priority of the simple contract debts of *Atkin*. If it cannot be sued on by the plaintiffs as representatives of *Gleadow*, the lending executor, not only will that priority be lost, but the interest of *Thew's* devisee in the bond must determine, for none but the plaintiffs can sue on it.

Thirdly, The rule against circuity of action does not apply. It exists only between parties who possess the same rights and are subject to the same liabilities(*b*). But no mutual right of action exists between these parties, for the present claim cannot be met by a counter right of action of a similar nature, since the defendants could not sue on this bond(*c*). The present defendants are sued as representatives of *Atkin*, the borrowing executor, on his bond, binding him and them to pay money generally; and might discharge themselves by pleading *plene administraverunt* of the goods of *Atkin*, their immediate testator; whereas if they, the plaintiffs, could be sued as representatives of *Gleadow*, the lending executor, they must be sued as representing the original testator, *Thew*, and *plene administraverunt* would be no defence, unless due administration as well of *Thew's* goods left unadministered as of *Gleadow's* effects should be made out.

(*a*) 2 T. R. 479.

(*b*) See the cases collected 2 Saund. 47, n., 149, n.; and *Carr* v. *Stephens*, 9 B. & Cr. 758; *Britton* v. *Webb*, 2 B. & Cr. 483.

(*c*) See *Cheetham and another, Executors*, v. *Ward*, 1 B. & P. 630.

Again, (assuming that the defendants could recover in such an action against the present plaintiffs), still the recovery in the two actions would be unequal, inasmuch as they have not an equal interest in the bond (*a*). For the plaintiffs' testator was guilty of a *devastavit* (*b*) in lending his testator's money on personal security, *Wilks* v. *Steward* (*c*), *Langston* v. *Ollivant* (*d*), *Holme* v. *Dring* (*e*); and for that act of his the present plaintiffs are, as his executors, liable over under 4 & 5 *W. & M.* c. 4. s. 12, to claims in respect of the estate of *Thew*. Now in no case where the rule against circuity has been acted on has the plaintiff been also liable over on another account. The liabilities of the parties to the present action also vary in amount in this particular, that if the borrower's assets prove unequal to pay this bond, the plaintiffs, as the lender's executors, will be liable to pay the deficiency occasioned by the act of their testator in his representative character. The plaintiffs have, therefore, a right to recover the bond debt, in order to secure its due appropriation, pursuant to the trusts in *Thew's* will, and by such means to secure themselves against the consequences of their testator's *devastavit*.

*Cresswell* in support of the plea. *Gleadow* committed no *devastavit* by lending his testator's money on bond, nor was such loan a misapplication of *Thew's* assets, unless loss accrued to his estate thereby in *Gleadow's* lifetime. As no such loss appears on the record to have happened, the present defendants are not liable. [*Bayley* B. Is not the lending to one, who has no right to borrow, a misapplication? Lord *Lynd-*

(*a*) *Anon.* Moor's R. 23, pl. 80, cited 2 Wms. Saund. 150.
(*b*) See *post*, 598, n. (*a*). (*c*) Cooper's R. 6. (*d*) *Ib.* 33.
(*e*) 2 Cox's R. 1.

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*hurst* C. B. It is a misapplication if it is not a *devastavit*(*a*).]

Nothing shows that money of *Thew* to the amount of the bond was ever possessed by *Gleadow*, or handed over by him to *Atkin*. When, after the bond given, *Gleadow* died, *Atkin*, as surviving trustee and executor of *Thew*, became immediately entitled to full control over all his assets, and *Gleadow's* estate would not be liable in equity for them in case of *Atkin's* insolvency, unless he had become so at the time of *Gleadow's* death, so as then to subject the estate of their testator *Thew* to loss. But no such insolvency is stated, and for all that appears the money was safe in *Atkin's* hands at *Gleadow's* death; how then can *Gleadow's* executors, the present plaintiffs, be liable for any loss happening after *Atkin* had full right over the whole assets, including this money? [*Bayley* B. A court of equity might at once say, that the loan by *Gleadow* to his co-executor *Atkin* was a misapplication. Then *Gleadow's* executors, to prevent any damage arising to his estate, might recover the money in order to its being laid out on property security.]

Circuity of action is inevitable if the plaintiffs recover, *Bishop* v. *Hayward*(*b*), *Alderson* v. *Langdale*(*c*); for the defendants might immediately sue for it again, as money had and received to their use, as executors of the goods of *Thew*, left unadministered by *Atkin*. My argument is, not that this bond is discharged by parol, but that the right to sue on it is gone by the operation of law, which vested *Thew's* assets in *Atkin* as surviving executor. If that were otherwise, no defence to a bond could be established by showing it to be given for

(*a*) See cases collected 1 Williams on Executors, 1114. As to what amounts to a legal *devastavit*, see per *Abbott* C. J. 3 B. & Ald. 633, *Webster* v. *Spencer*; and 2 B. & Cr. 155, *Clark* v. *Hengham*, per *Bayley* J.

(*b*) 4 T. R. 470.

(*c*) K. B. Easter, 1832; not published when this page was printed.

an illegal consideration, as in the cases of sale of an office, *Greville* v. *Attkins* (*a*); illegal trading, *Paxton* v. *Popham* (*b*); compounding a criminal prosecution, *Collins* v. *Blantern* (*c*). Suppose the fact to have been, that *Gleadow*, having *Thew's* money in his hands, lent it to *Boyle* on his bond, and that *Boyle* was sued by *Gleadow's* executors, he might plead a payment to *Atkin*, as the executor who had survived *Gleadow*.

[Lord *Lyndhurst* C. B. A recovery in this action gives power to *Gleadow's* executors to lay out the money on proper security; but till the money is paid to the plaintiffs, there is a risk to them, nor is the possession of *Atkin* tantamount to payment, for his estate may be insolvent.

*Bayley* B. In the supposed case put, is it certain that *Atkin* would be entitled to the money so paid by *Boyle*? *Gleadow's* executors might insist on its being laid out in real or other proper security.

*Holland* B. It is argued that the right to sue possessed by *Gleadow* ended with his life. Would not that deprive his executors of the protection he intended to his estate, by enabling them to get back the money into their hands, so as to indemnify *Gleadow's* estate?

*Bayley* B. The action assumes the money to have been in the deceased, *Atkin's*, hands; not as a trustee of *Thew*, but as a borrower from such a trustee. If this money is not now mixed with *Atkin's* assets, the representatives of *Thew* have a right to lay hands on it, in order to its being properly laid out. If it is, the plaintiffs must come in *pari passu* with other creditors of *Atkin*.]

Lord LYNDHURST C. B.—I am of opinion, that the lending, by one executor to the other, of the assets of their testator, was a misapplication of those funds and an

(*a*) 9 B. & C. 462. (*b*) 9 East, 408. (*c*) 2 Wils. 357, n.

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improper discharge of the trust; so that if hereafter any loss should result, the estate of the lending executor would be liable for the amount (*a*). It follows that these plaintiffs have a right to recover on this bond. They should pay over the money recovered in the proper manner to the executors of the surviving executor, thus availing themselves of the right means to get rid of their responsibility for their testator *Gleadow*.

BAYLEY B.—I am of the same opinion. *Gleadow* and *Atkin's* authority was to lay out *Thew's* money on real or other security of which they should approve. Neither of them had any right to lend to the other the testator's money, because he thereby gave that other personal controul over it, and instead of keeping it distinct as the separate estate of *Thew*, enabled him to mix it with his own general personal estate. It must be presumed that the testator's money thus lent was mixed up with *Atkin's* separate estate; and if so, the misapplication of the money by the loan of it to *Atkin*, made *Gleadow* in his lifetime, and his personal estate since his death, responsible for the money, till laid out, as the will directs, on real or other sufficient security. This threw a responsibility upon *Gleadow* in his lifetime, and upon his personal estate after his death, from which his executors are entitled to relieve that estate. Enforcing payment on this bond is the means by which they may obtain that relief. It will enable them to see to the due application of the money, to have it laid out on real or other proper security, and to take care that it is not mixed with the assets of *Atkin*, but that it is kept separate as the assets of *Thew*. No plea like the present could have been an answer to an action

(*a*) See Williams on Executors, 1114.

on a covenant to pay to *Gleadow* or his executors, had the object of such covenant been expressed on the face of it to be, that the money to be recovered might be applied to the original trusts of *Thew's* will in exoneration of *Gleadow* and his executors. And does not the form of this instrument speak as plainly as the express words of such a covenant would have done, and does it not in substance amount to the same thing?

BOLLAND B.—On this record the transaction is between executors; and I am clearly of opinion that the loan by one to the other of them, was, *pro tanto*, a misapplication of their testator's money. *Gleadow* must have known, that by suffering *Atkin* to have possession of the money for his personal purposes, he was making such a misapplication; then, to prevent consequences, he took this bond. The language of this security can bear no other fair construction; then it entitles *Gleadow* and his executors to throw that protection round his estate which he intended, and enables them to pay over the money, when received, to the executors of *Atkin*. The argument founded on avoiding circuity of action does not apply; for in order that it should, the counter remedy must be precisely the same; now in this instance it would not deprive *Gleadow's* executors of their right to sue on this bond.

GURNEY B. concurred.

Judgment for plaintiff.

## KERSWILL *against* JANE BISHOP.

A ship was mortgaged with power of sale in order to repayment of a sum lent on that security. She afterwards sailed from *England* to the *West Indies*, and returned to the *Thames* with a cargo. At *Gravesend*, near the end of the voyage, she was taken possession of by the mortgagee: Held, that the accruing freight on the inward cargo belonged to the mortgagee as incident to the property in the ship, notwithstanding the register act, 6 *G.* 4. c. 110. s. 45. which provides against the mortgagee being deemed an owner, except as far as may be necessary to obtain payment of his debt.

THIS was a case directed by the Master of the Rolls for the opinion of the Court of Exchequer. The facts were in substance these:—Before 2 *August* 1826, and from that day to the 5th *Sept.* following (except as hereafter mentioned), *James Bishop* was sole owner of the ship *Star*, then belonging to the port of *London*, with her tackle &c. and was indebted to the plaintiff in 137*l.* 6*s.* 6*d.* wholly, or in part, for work and labour done by the plaintiff in repairing, and for materials found for that ship. *James Bishop* being so indebted before 2 *Aug.* 1826, agreed to give the plaintiff a mortgage of the ship as a security for the said debt, and such mortgage so agreed to be given by him, *James Bishop*, was with his consent prepared for his execution as such security, by indenture hereinafter mentioned. On 5 *August* 1826, *James Bishop* made and executed a certain power of attorney, under his hand and seal, and thereby recited, as the fact was, that he, the said *James Bishop*, being then about to leave *England* and to reside for a time at *Gibraltar*, had requested his wife, *Jane Bishop* (the above defendant) to take upon herself the care of his estate and property, and to act for him in his affairs during his absence, which she, the said *Jane Bishop*, had agreed to do; then by the said power of attorney so under his said hand and seal, he, the said *James Bishop*, did thereby make, ordain, depute, constitute and appoint, and in his place and stead put the said *Jane Bishop* his true and lawful attorney, for him and in his name, for his use and on his behalf, at any time or times during the continuance of the said presents, when she his said wife, *Jane Bishop*, should see occasion or think proper, for him and in his name, amongst other things, to sell, mortgage, or otherwise

assign, transfer, or dispose of, by way of security for any debt or demand owing by him, the said ship or vessel, *Star*, or any part thereof, of which he was (as therein and thereby alleged) sole owner, together with the tackle and other materials belonging thereto [here followed a description of the measurement of the ship and of her being *British* built], as appeared by a certificate of registry, No. 586, granted at *London* the 1st day of *July* then last past, and to sign, seal, and deliver bills of sale, assignments, and such other writings as should be necessary for perfecting the sale of, or mortgaging, or otherwise transferring the said vessel, and to give receipts and discharges for the money for which the said ship or vessel should be sold, mortgaged, or transferred, and to demand, levy, sue for, and recover of and from all persons whom it may concern, all such sums of money as then were or should grow due to him the said *James Bishop*, in respect of the said ship or vessel, *Star*, for freights or otherwise; and to sign receipts or discharges for the same, and to freight, settle averages, and effect insurances, hire all masters, seamen, and other servants, and discharge them at pleasure, and do all other acts and things which she, the said *Jane Bishop*, should think proper and expedient in the management of his said ship or vessel, *Star*, and all the appurtenances to the said ship or vessel belonging or appertaining, and generally to do all and every or any acts, deeds, matters or things whatsoever in and about the estates, property, goods, merchandize, and affairs of him, the said *James Bishop*, as amply and effectually to all intents and purposes as if he were personally present and did the same, he, the said *James Bishop*, thereby ratifying and confirming, and promising and agreeing, at all times, to allow, ratify, and confirm all and whatsoever his said wife should

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lawfully do, or cause to be done, in and about the premises therein aforesaid by virtue thereof.

On the 5th of *September* 1826, she, the said *Jane Bishop*, under and by virtue of the said hereinbefore mentioned power of attorney, so as herein aforesaid given to her, duly made and executed the said indenture, so as hereinbefore mentioned, prepared with the consent of him, the said *James Bishop*, and the same was an indenture drawn and made to bear date the said 2d day of *August* 1826, and the same was made and expressed to be made by and between the said *James Bishop*, of the one part, and the said plaintiff of the other part; and it was thereby recited, as the fact was, that the said *James Bishop* was then the sole owner of the ship or vessel called the *Star*, belonging to the port of *London*, at which port she stood duly registered pursuant to act of parliament; and a copy of the certificate of such registry was stated in the said indenture; and by which indenture was further recited the said debt of 1379*l.* 6*s.* 6*d.*, and the said consent and agreement of the said *James Bishop* to give the said mortgage or security of the said ship or vessel by the said indenture. In pursuance of the said therein recited agreement, and for effectually securing to the said plaintiff the said sum of 1379*l.* 6*s.* 6*d.*, with lawful interest thereon from thenceforth, and also in consideration of 10*s.* he, the said *James Bishop*, granted, bargained, sold, assigned, transferred, and set over unto the said plaintiff, his executors, administrators, and assigns, all those full and undivided 64-64th parts or shares, being the entirety of and in the said ship or vessel called the *Star*, belonging to the port of *London*, and then lying in the river *Thames*; together with all and singular the masts, sails, sail yards, anchors, cables, ropes, boats, bars, tackle, apparel and furniture, and

other appurtenances whatsoever to the said ship or vessel belonging or in any wise appertaining, and every part and parcel thereof; and all the right, title, interest, benefit, claim and demand whatsoever, of him the said *James Bishop*, of, in, or to the said thereby assigned premises, every or any part thereof. To have and to hold the said full and undivided 64-64th parts or shares, or the entirety of and in the said ship or vessel, and all and singular other the premises thereinbefore described, and also bargained or expressed, or intended so to be, and every part and parcel thereof, with the appurtenances, unto the said plaintiff, his executors, administrators and assigns. Upon trust—(power to plaintiff, his executors, administrators, and assigns, to sell and absolutely dispose of the ship, or to buy her, and resell her, without liability for loss or diminution in price by such sale, and to assign her to the purchasers; and on further trust out of the money to arise and be produced by freight or otherwise from the said ship, which should be received by plaintiff, or his executors, &c. till such sale made, and likewise out of the produce of the sale to retain the expenses of executing the trusts, of insuring the vessel, of suits for obtaining possession of her, or for enforcing any agreement to buy her, after payment of which, and of the principal money advanced, with 5 per cent. interest, then to reassign to *James Bishop*, his executors, administrators, or assigns, freed from all incumbrances of the plaintiff.)

On the 7th day of *July* 1828, the said ship or vessel, the *Star*, was about to leave the said port of *London* upon a voyage to the *West Indies* or elsewhere beyond the sea, and back to the said port of *London*, and thereupon she, the said defendant, as such attorney for the said *James Bishop* as aforesaid, signed and delivered to one Mr. *Patrick Home*, as agent in that behalf

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for the said plaintiff, a certain paper writing in the words and figures following, that is to say:—

"*London*, 7th *July* 1828.

"Mr. *Patrick Home*, agent for Mr. *William Kerswill*, mortgagee on the brig *Star*.

"Sir,—I authorize you to receive from Messrs. *William Martin* & Co., the sum of 200*l*., when the outward freight of the brig *Star* shall have been received by them; and further engage that on this vessel's return from her intended voyage that you shall receive the balance of her freight inwards. Given under my hand at *London*, this 7th day of *July* 1828.

"(Signed) *Jane Bishop*,

"Attorney for *James Bishop*, owner of the brig *Star*."

In the month of *January* 1829, the *Star* was, in the course of her voyage mentioned in the said last-mentioned paper writing, in the harbour of *Kingston*, in the island of *Jamaica*, in the *West Indies*, seeking for a cargo on freight to *England*, whereupon several persons loaded on board her, under agreement with the master, different parcels of colonial produce upon freight to *England*, which were by them consigned to different consignees in *Great Britain*, and the usual and proper bills of lading were respectively signed by the master, in respect or on account of the said merchandize so put and loaded on board, and were delivered to the respective shippers or consignors. On or about the 3d of *March* 1829, the *Star* so laden departed from *Kingston* on her homeward voyage, and on or before the 3d of *May* 1829 arrived in the river *Thames* with such last-mentioned cargo on board; and on the said 3d of *May* 1829, while she was on her voyage to the port of *London*, the said plaintiff, by an agent duly by him authorized in that behalf, took and

obtained possession of her and her papers, and continued so possessed thereof until the sale thereof hereinafter mentioned; and while in his possession the said ship continued and completed her said last-mentioned voyage, from the said harbour of *Kingston* to and entered the said port of *London* respectively aforesaid, with the said last-mentioned cargo on board. Shortly after such last-mentioned arrival in the port of *London*, and while she continued in possession of the plaintiff, she went into the *West India Docks* and there delivered the whole of her said cargo into the warehouses of the *West India Dock* Company, from whence the same, and every part thereof, was delivered to the different respective consignees thereof, some of whom paid to the said plaintiff the freight thereupon due from them respectively, but others, on receiving their respective consignments, declined to pay the freight thereof to the said plaintiff, but respectively deposited the amount thereof in money with, and the same remained in the hands of, the said *West India Dock* Company, pursuant to the statute. On 16 *Sept* 1828, *James Bishop* died, having first made his will, and thereby appointed the said defendant sole executrix thereof, which will she duly proved, and is his sole legal personal representative, and as such claimed the freight so as herein aforesaid earned by the said ship or vessel the *Star*, and the amount of which has been deposited with, and is remaining in the hands of, the said *West India Dock* Company, as hereinbefore stated. The plaintiff claimed the last-mentioned freight as mortgagee of the said ship or vessel, the *Star*, and being in such possession thereof on the completion and termination of the said last-mentioned voyage. The plaintiff afterwards sold and disposed of the said vessel, the *Star*, and applied the whole of the money produced thereby, as well as the said freight by him

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received, in part payment of his said debt, but the money so received by him is insufficient to pay the whole of his debt.

The question is, whether, under all the circumstances hereinbefore stated, the said plaintiff or the said defendant is entitled to receive the said freight now unpaid, and the amount of which is now, as hereinmentioned, in the hands of the said *West India Dock* Company?

*Maule* for the mortgagee. The question is, whether by 6 *Geo.* 4. c. 110. the mortgagor or mortgagee of a ship are entitled to freight accruing after the mortgage? That statute was intended to benefit mortgagees of ships, who, having furnished stores, &c. for a voyage on that security, remained out of possession. Sect. 45 (*a*) was intended to remove doubts as to their liability as owners, but not to divest their former rights on taking possession. This appears by the words of

(*a*) Enacting "That when any transfer of any ship or vessel, or of any share or shares thereof, shall be made only as a security for the payment of a debt or debts, either by way of mortgage, or of assignment to a trustee or trustees, for the purpose of selling the same for the payment of any debt or debts, then and in every such case the collector and comptroller of the port where the ship or vessel is registered shall in the entry in the book of registry, and also in the indorsement on the certificate of registry, in manner hereinbefore directed, state and express that such transfer was made only as a security for the payment of a debt or debts, or by way of mortgage, or to that effect; and the person or persons to whom such transfer shall be made, or any other person or persons claiming under him or them as a mortgagee or mortgagees, or a trustee or trustees only, shall not by reason thereof be deemed to be the owner or owners of such ship or vessel, share or shares thereof; nor shall the person or persons making such transfer be deemed by reason thereof to have ceased to be an owner or owners of such ship or vessel, any more than if no such transfer had been made, except so far as may be necessary for the purpose of rendering the ship or vessel, share or shares so transferred, available by sale or otherwise for the payment of the debt or debts for securing the payment of which such transfer shall have been made."

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the exception in that clause. The analogous cases before the statute show clearly, that freight accruing after transfer of a ship, belongs to the mortgagee, who takes possession. Thus, the transfer of a ship by assignment was held to entitle the assignee to the freight earned afterwards as incident to the ship, even though the assignor had chartered her before the assignment, and afterwards assigned the charter-party to another; *Morrison* v. *Parsons* (*a*). Again, where separate sets of underwriters had insured ship and freight, and, on a supposed total loss by capture, both were abandoned, and each set of underwriters paid a total loss; freight earned by the ship after recapture was held to belong to the underwriter on the ship, as incident to the property; *Case* v. *Davidson* and Others (*b*). And though it was very important there to dispute the position that a contract to transfer a ship carries the accruing freight, it was never attempted by the eminent counsel who argued. *Splidt* v. *Bowles* (*c*) shows that an assignee of a ship cannot sue in his own name on a covenant in a previous charter-party under seal, to pay freight to the bankrupt, as owner; for the contract being merely personal, any portion of beneficial interest remaining in the bankrupt under it passed to his assignees, who might therefore sue as representing him. But in *Dean* v. *M'Ghie* (*d*) it was distinctly held, that by the mortgage of a ship accruing freight passes to the mortgagee, notwithstanding 6 *Geo.* 4. c. 110. s. 45. There, as in this case, the ship was taken possession of by the mortgagee at *Gravesend*, on her return home. The transfer, which was inchoate by deed before the voyage began, was completed by taking possession before it closed.

(*a*) 2 Taunt. R. 407.

(*b*) 5 M. & S. 79. *S.C.* in error, 2 Brod. & B. 379.

(*c*) 10 East, 279. (*d*) 4 Bing. 45.

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[Lord *Lyndhurst* C. B. In *Chinnery* v. *Blackburne* (*a*) possession was not taken by the mortgagee till after the voyage was completed; and it was held, that freight earned in that voyage, though after the mortgage, could not be recovered by the mortgagee.] Payment of freight by consignee to mortgagor in possession for goods delivered by him, would be good as against the mortgagee, for the mortgagor remains in possession of the ship by his allowance, and ought to pay over the freight to him. Here, however, the mortgagee took possession before the freight was earned by the completion of the voyage.

*Shee* for the executrix of the mortgagor. Profits not in existence at the time of the conveyance, cannot pass by assignment of the freight, earnings and profits of a ship, *Robinson* v. *Macdonnell* (*b*); and it might have been elsewhere questioned, whether the authority of the wife of this mortgagor, however general in other matters, was not so restricted as to this ship as to prevent her from mortgaging freight not earned at the time. But the question intended to be argued was, whether accruing freight passes to the mortgagee as incident to the ship? Any supposed understanding of shipowners that it does, must be ascribed to the fact, that before 4 *Geo.* 4. c. 41. s. 43. (replaced by 6 *Geo.* 4. c. 110. s. 45.) mortgagees, for all that appeared on the custom-house entries, were absolute owners of the ship. But cases in which the present point was likely to arise could only have occurred since 5 *January* 1826, when 6 *Geo.* 4. c. 110. or at all events since 1 *September* 1825, when 6 *Geo.* 4. c. 16. (the new bankrupt act) came into operation. Before s. 72 of the latter act, a ship mortgaged by her

(*a*) B. R. *Easter*, 24 *G.* 3; 1 H. Bla. 117, n.

(*b*) 5 M. & S. 228, 236; *S.C.* in Chancery, 8 Pri. 269, n.

owner, would, with her freight, have passed to his assignees, where she had been left in his order and disposition after the mortgage; *Hay* v. *Fairbairn* (*a*).

Assignment, transfer, and mortgage have been assumed on the other side to be synonymous before stat. 4 *Geo.* 4. c. 41. s. 43. and 6 *Geo.* 4. c. 110. s. 45; but in *Jackson* v. *Vernon* (*b*) the court distinguish between assignment absolutely, and by way of mortgage only. *Chinnery* v. *Blackburne*, there cited, rebuts any inference that the mortgagor of a ship in possession is the agent or servant of the mortgagee; and shows that till the mortgagee takes possession the mortgagor is absolute owner. In *Morrison* v. *Parsons* (*c*) the assignment was absolute to the captain before the voyage, without equity of redemption, and the assignee was in possession during the whole voyage, so that the right to freight accruing subsequently to the assignment must have belonged to the assignee of the ship as incident thereto. Mr. Justice *Lawrence* there says (p. 415) "*Sharp* v. *Gladstone* (*d*) is the only case that seems to bear on the point; according to Lord *Ellenborough*'s idea in his judgment there, after abandonment of a chartered ship the underwriters would be entitled to freight earned afterwards." In *Thompson* v. *Rowcroft* (*e*) Lord *Ellenborough* threw out that the underwriters on the ship, from the time of the abandonment, stood in the same situation as the owner, and subject to his liabilities. In *Case* v. *Davidson*, Lord *Tenterden*, then Mr. Justice *Abbott*, expressed his opinion that an abandonment is equivalent to the sale of a ship, in which latter case the vendee is entitled to the freight as an incident to the ship. If, therefore,

(*a*) 2 B. & Ald. 493, and 6 B. & C. 176.
(*b*) 1 H. Bla. 114.
(*c*) 2 Taunt. 407, 415.
(*d*) 7 East, 24, an embargo case. And see 5 M. & S. 83.
(*e*) 4 East, 52; see 7 East, 29, 30.

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abandonment be tantamount to absolute sale, it is also distinct from mortgage. *Splidt* v. *Bowles* (*a*) went off on a technical point; but if the mortgagor in that case was entitled to sue for freight on the charter-party, and the mortgagee also to sue for it as incident to the ship, then unless payment to the mortgagee can be pleaded in bar to the claim of the mortgagor, two demands would be available for the same amount. So, freight bills would bind the owner only, and might be assigned without effect, because the master would not be the agent of the mortgagor. There would be two demands against the consignees, one on the bills before the goods were delivered, and the other by the mortgagee. In *Chinnery* v. *Blackburne* (*b*) the mortgagee did not take possession till after the ship and goods arrived in *London*; but that case does not decide that the mortgagee, if previously in possession, would have been entitled to the freight earned. [*Bayley* B. Here, before the end of the voyage, the mortgagee gets the goods into his possession. The consignee is only entitled to them on payment of freight. Then is the mortgagee entitled to have that freight paid to him?]

The possession of the mortgagee is only for two days before the end of the voyage, whereas his liabilities would not be co-extensive with it; *e.g.* when stores were provided or when sailors are obtained. Suppose freight to have become payable at various places on a circuitous voyage, would there be a claim to it except between owner and consignee? [Lord *Lyndhurst* C. B. The party having the legal estate is in possession before the end of the voyage; what is the consequence if the mortgagee of a real estate gets possession before the rent day?] By stat. 6 *Geo.* 4. c. 110. s. 45. the mortgagee of a ship is not its owner, which disposes of the cases as to sale and abandonment. *Dean* v.

(*a*) 10 East, 279. (*b*) 1 H. Bla. 117, n.

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*M'Ghie*, when examined, does not decide this case. The question there was, whether a mortgagee having paid in part a sum for portage, which if mortgagor had remained in possession, he must have paid, could charge that sum against the mortgagor in the equitable action of money had and received? Mortgagees were not liable as such for provisions, cordage, &c. supplied before the act, so as to make it desirable to exonerate them from such liability; the question having been settled to be, not one of title, but (as well since the register acts as before) to whom the credit was given; *Annett* v. *Carstairs* (*a*), *Briggs* v. *Wilkinson* (*b*), *Jennings* v. *Griffiths* (*c*); though it was formerly thought that liability to a ship's debts was consequent on the title to her freight. The register acts were passed for purposes of public policy, to confine to *British* subjects and *British* built ships the benefit of *British* trade; not to give notoriety to the conveyances affecting ships. That notoriety is only a consequence of the measures adopted to effect the policy of the state (*d*): stat. 6 *Geo.* 4. c. 110. is a transcript of 4 *Geo.* 4. c. 41. (now repealed by 6 *Geo.* 4. c. 105. s. 371,) and by s. 46. was intended to obviate the decisions in *Robinson* v. *Macdonnell* (*e*), *Hay* v. *Fairbairn* (*f*), *Kirkley* v. *Hodgson* (*g*), and *Monkhouse* v. *Hay* (*h*); according to which, assignees of a bankrupt owner, in whose order and disposition a ship remained to his bankruptcy, were entitled to the ship, notwithstanding the legal interest had become vested in a mortgagee by registry in his name. After s. 43 has provided means for obtaining evidence of registry, and s. 45 has ascertained precisely the limited estate of a mortgagee in her, s. 46 then deduces that the mortgagor's assignees

(*a*) 3 Camp. 354. (*b*) 7 B. & Cr. 30. (*c*) 1 Ryan & M. 42.
(*d*) See per Lord *Ellenborough*, *Robinson* v. *Macdonnell*, 5 M. & S. 238.
(*e*) 5 M. & Sel. 228, 239. (*f*) 2 Bar. & Ald. 193. 134.
(*g*) 1 B. & Cr. 588. (*h*) 2 Brod. & B. 114.

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shall have no title except to the surplus, after payment of the mortgage money. The only object of those sections was to enable the mortgagee to sell the ship. Section 72 of the bankrupt act, 6 *Geo.* 4. c. 16. shows that the assignment of any ship by way of mortgage duly registered, is an exception to the ordinary rules, and is treated as distinct from sales.

*Pothier*, in his *Œuvres Posthumes*, c. 14, *Traite de Nantissement*, lays it down that profits to come are not the subject of pledge; which corresponds with the civil law, which only allowed a *pignus* to exist where a *traditio rei* was practicable.

[*Bayley* B. Suppose freight to be insured, and that a total loss being worked by capture, abandonment takes place, the ship is retaken, and before arrival at port the mortgagee takes possession of her, who would be entitled to freight?] Perhaps the abandonee, if the loss was by capture in the *Downs* before the mortgagee took possession (*a*).

*Maule* in reply. *Abbott on Shipping* (5 edit. p. 17) shows that a mortgage of a ship amounts to a transfer. The difference of opinion which had prevailed as to the liability of a mortgagee for a ship's debts sufficiently accounts for the terms of 6 *Geo.* 4. c. 110. s. 45. In *Robinson* v. *Macdonnell*, Lord *Ellenborough* says, that if the deed in the case before him is not to be confined to the freight and earnings &c. of the ship under the then subsisting charter party, but is to extend to all freight &c. in subsequent voyages, it is open to the objection made by the lord chancellor in *Speldt* v. *Lechmere* (*b*), that it will for ever separate

(*a*) But see *Case* v. *Davidson*, 5 M. & S. 79, 2 Br. & B. 379, to which Lord *Lyndhurst* (after noticing the difficulty of such a question) expressed an inclination to adhere.

(*b*) 13 Vesey, 588.

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the ship and her earnings. Now, if the mortgagee had a right to take possession, has he not a right to hold the goods till the owners pay him the freight? In *Jackson* v. *Vernon* (*a*) the mortgagee was out of possession. [Lord *Lyndhurst* C. B. Possession having been taken in the course of the voyage, the number of days before its conclusion makes no difference. *Bayley* B. It was not necessary to decide this point in *Dean* v. *M'Ghie* (*b*) ].

The court was there obliged judicially to determine that a mortgagee might lawfully take possession of the vessel, and conduct himself as owner in making payments on account of her, charging them against the mortgagor. For the greater part of those payments could not have been portage dues necessarily payable in order to receive the freight from the consignees, but must have been sums paid to seamen for wages. Their remedy against the ship continued, but the mortgagee would not be liable for wages till he had received the freight.

*Cur. adv. vult.*

The following certificate was afterwards sent:—

This case has been argued before us by counsel. We have considered it, and are of opinion that the plaintiff is entitled to the freight now unpaid.

LYNDHURST.
J. BAYLEY.
W. BOLLAND.
J. GURNEY.

(*a*) 1 H. Bla. 114. (*b*) 4 Bing. 45.

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## IN THE EXCHEQUER CHAMBER.

## GURNEY *against* GORDON and Another.

(In Error from the King's Bench.)

Before TINDAL C. J.—Lord LYNDHURST C. B.—PARK, GASELEE and BOSANQUET, Justices of C. P.—BAYLEY, VAUGHAN and BOLLAND Bs.

Costs incurred by opposing a petition against the return of a member to parliament, may be recovered under 9 *Geo.* 4. c. 22. s. 57. and s. 63. against one of two persons who have signed it. *Remittitur* of damages where judgment was by default in debt on a remedial statute.

AN action of debt had been brought on 9 *Geo.* 4. c. 22. "An Act for consolidating and amending the laws relating to the trial of controverted elections or returns of members to serve in parliament" (*a*).

(*a*) Sect. 57 of 9 *Geo.* 4. c. 22. enacts, "That whenever any committee appointed to consider the merits of any petition complaining of an undue election or return, or of the omission to return any members of parliament, shall report to the house with respect to any such petition (except as hereinbefore excepted), that the same appeared to them to be frivolous or vexatious, the party or parties, if any, who shall have appeared before the committee in opposition to such petition shall be entitled to recover from the person or persons, *or any of them*, who shall have signed such petition, the full costs and expenses which such party or parties shall have incurred in opposing the same; which costs and expenses shall be ascertained in the manner hereinafter directed."

Sect. 60 enacts, "That the costs and expenses of prosecuting or opposing any petition presented under the provisions of this act, and the costs, expenses and fees which shall be due or payable to any witness summoned to attend before such committee, or to any clerk or officer of the House of Commons, upon manner following; that is to say, on application made to the Speaker of the House of Commons, within three months after the determination of the merits of such petition by any such petitioner, party, witness or officer, as before mentioned, for ascertaining such costs, expenses or fees, the speaker shall direct the same to be taxed by two persons, of whom the clerk or one of the clerks assistant of the house shall always be one, and one of the following officers, not being a member of the house, shall be the other; that is to say, masters in the High Court of Chancery, clerks in the Court of King's Bench, prothonatories in the Court of Common Pleas, and clerks in the Court of Exchequer; and the persons so authorised and directed to tax such costs, expenses and fees shall, and they are hereby required to examine the same, and *to report the amount thereof, together with*

The 1st count of the declaration stated, that on &c., at &c., the defendant (*a*) was indebted to the plaintiffs (*a*) under and by virtue of a certain act of parliament made and passed &c. (title of 9 *Geo.* 4. c. 22.) in the sum of 1260*l.* 10*s.* 8*d.* for the costs and expenses incurred by the said plaintiffs in opposing the petition of the said defendant and one *C. K.* complaining of an undue election and return for the borough of *Tregony*, and to be paid by the said defendant to the said plaintiff when he the said defendant should be thereunto afterwards requested, whereby and by reason of the said last mentioned sum

*the party liable to pay the same*, to the speaker of the said house, who shall, upon application made to him, deliver to the party or parties a certificate signed by himself expressing the amount of costs, expenses and fees allowed in such report, together with the name of the party liable to pay the same; and such certificate so signed by the speaker shall be conclusive evidence of the amount of such demands in all cases, and for all purposes whatsoever; and the witness, officer or party claiming under the same, shall, upon payment thereof, give a receipt at the foot of such certificate, which shall be a sufficient discharge for the same."

Sect. 63 enacts, "That it shall and may be lawful for the party or parties entitled to such costs and expenses, or for his, her, or their executors or administrators, to demand the whole amount thereof so certified as above, *from any one or more of the persons* respectively who are hereinbefore *made liable* to the payment thereof in the several cases hereinbefore mentioned, and in case of nonpayment thereof to recover the same by action of debt in any of his majesty's courts of record at Westminster; in which action it shall be sufficient for the plaintiff or plaintiffs to declare that the defendant or defendants is or are indebted to him or them in the sum to which the costs and expenses, ascertained in manner aforesaid, shall amount by virtue of this act, and the certificate of such amount, so signed as aforesaid by the speaker, shall have the force and effect of a warrant to confess judgment; and this court in such action, and the court in which such action shall be commenced, shall, upon motion and on the production of such certificate, enter up judgment in favour of the plaintiff or plaintiffs named in such certificate for the sum specified therein to be due from the defendant or defendants in such action, in like manner as if the said defendant or defendants had signed a warrant to confess judgment in the said action to that amount."

(*a*) The plaintiff in error is here named the defendant, and the defendants in error the plaintiffs, according to their position in the original cause.

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of money being and remaining wholly unpaid, and by virtue of the said act, *actio accrevit, &c.*

The aggregate of the sum claimed by the above and other counts amounted to upwards of 7260*l.* 10*s.* 8*d.* Judgment was had by default as directed by 9 *Geo.* 4. c. 22. s. 63. Entry of *remittitur* of 6000*l.* parcel of that sum (*a*) and prayer of judgment for the residue of the debt and their damages (*b*) by occasion of the premises in the first count. The bill having been brought in to the K. B. on 27 *April* 1831, final judgment was signed on 25 *May* following for 1260*l.* 10*s.* 8*d.*, and for 2*l.* damages sustained as well by occasion of the detaining the said residue of the said debt, as for their costs, &c.

*Archbold* for the defendant *Gurney*. The first count shows that the petition in question was not only that of the defendant but of *C. K.* also. The action therefore should have been brought against both of them, as having signed a petition, which, in order to suing at all in the present action, must have been declared frivolous or vexatious. The defendant could not take this objection otherwise than on error, being compelled by sect. 63 to suffer judgment on default. The death of *C. K.*, had it occurred, should have been suggested.

On s. 40, the committee could only report whether the petition were frivolous or vexatious or not, and could not affix that charge on either petitioner to the

(*a*) See cases cited 1 Saund. 286. n. 10, as to the plaintiff's power to remit an excess of damages claimed or given in an action where a sum certain is not sought for, but such damages as a jury shall give; and see *Arden* v. *Connell*, 5 B. & Ald. 835, as to the necessity for writs of inquiry in actions of debt for unascertained sums, since it has been held that plaintiffs can recover less than the precise sum gone for in the commencement of the declaration. *Taylor* v. *Capper*, 14 East, 442, shows the old rule.

(*b*) See the rule against recovering damages in a popular action, *Cuming* v. *Sibley*, 4 Burr. 2489. *Hardy* v. *Catheart*, 1 Marsh. 180. The act 9 *Geo.* 4. c. 22. is therefore acted on here as a remedial statute.

exclusion of the other. The speaker's certificate, which contained the name of the defendant only as liable to pay, was therefore void. [Lord *Lyndhurst* C. B. Why may not a petition signed by two or more be vexatious as to one, and not as to another who may have acted *bonâ fide?* *Bayley* B. Suppose a candidate procured electors to join him in a petition and pays all its expenses, may not a committee report the petition to be frivolous or vexatious as to him only?] Again, s. 40 directs the committee to report distributively, viz. with respect to *every* party whose opposition to the petition has appeared to them frivolous or vexatious.

*Per Curiam.* It is quite clear that upon sections 57 and 63, the plaintiff may sue any one of the parties signing the petition whom he may think proper. For by s. 57, the party who appeared before the committee in opposition to the petition, may recover from the person or persons who have signed the petition, *or any of them*, the full costs and expenses of such opposition; and under s. 63, the party entitled to such costs and expenses may demand the amount certified by the speaker from any one or more of the persons made liable to payment thereof under s. 60.

As the last point does not arise on this record, it is not necessary to express any opinion on it.

Judgment affirmed, the court refusing to give interest.

*Coleridge* Serjt. was to have argued for the plaintiffs.

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## IN THE EXCHEQUER CHAMBER.

## HUTTON and Others *against* BALME and Others.

(In Error from the Exchequer of Pleas.)

Before Lord TENTERDEN C. J.—TINDAL C. J.—LITTLEDALE, TAUNTON, and PATTESON, Justices of K. B.—A. PARK, GASELEE, and BOSANQUET, Justices of C. P.

Held by seven judges of K. B. and C. P. (*Gaselee* J. dissentiente) that the judgment of the Court of Exchequer of Pleas (*ante*, 17) should be reversed.

IN the vacation after Easter term 1832, this special verdict (see *ante*, p. 17,) was argued by *Starkie* for the plaintiffs in error, and by *F. Pollock* for the defendants in error; but the length at which the learned judges delivered their opinions seriatim makes it improper to mention more here, than that the authorities on both sides were reviewed in the most complete and elaborate manner. Its importance has occasioned its insertion as soon as possible after the term of which it was argued. The court took time to consider, and in *Hilary* term 1833 reversed the judgment of the Court of Exchequer.

The following judgments were delivered.

Mr. Justice PATTESON after stating the special verdict, (*ante*, p. 17) proceeded thus.—The Court of Exchequer has given a very elaborate judgment, and has decided that the verdict should be entered for the defendant *Jewison*, and against the defendant *Ingham*. Upon that judgment a writ of error has been brought. The decision against the defendant *Ingham* proceeds on the ground, that he being the bailiff who executed the writ of *fi. fa.*, took an indemnity from the execution creditor, and is therefore identified with him. But the court held, that the defendant *Jewison*, the chief bailiff, whose officer *Ingham* was, is not affected by this circumstance. I confess that it appears to me, as at present advised, that if *Ingham* be identified with the execution creditor in consequence of what he has done in the course of

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executing the writ, *Jewison* is so likewise. *Jewison* would be liable for all acts done by *Ingham* as officer, even for any extortion committed by *Ingham*, though contrary to his express order; *Jewison* can have the benefit of the indemnity taken by *Ingham*, and is, in my apprehension, exactly in the same condition as *Ingham*. However, as the other point in this case is the most important one, I will proceed to examine it, having stated only thus much on the point of indemnity, lest I should be supposed to agree entirely with the Court of Exchequer upon it.

The principal question then is this:—Is a sheriff liable to an action of trover at the suit of the assignees of a bankrupt, when upon a *fi. fa.* against a trader who has committed a secret act of bankruptcy, of which the sheriff is wholly ignorant, he seizes and sells?

I am of opinion that he is liable. It has been so considered for a great length of time; and though I admit that the case of *Cooper* v. *Chitty*, reported 1 *Burr.* 20, does not necessarily decide the point, because in that case the sheriff sold the goods after a commission of bankrupt had issued, yet the general understanding of the profession has long treated that case and the subsequent practice as decisive of this question. Accordingly in *Lazarus* v. *Waithman* (*a*), the Court of Common Pleas expressly so held; and in that case the older authorities, and particularly *Bayly* v. *Bunning* (*b*), were cited by counsel; afterwards in *Price* v. *Helyar* (*c*), the Court of Common Pleas again decided in the same manner, on the same ground; and according to the report in *Moore* and *Payne*, the counsel for the defendant cited *Bayly* v. *Bunning*. The Court of Exchequer had also held the same doctrine some time before in the case of *Potter* v. *Starkie*, cited in 4 *Maule* and *Selwyn*, 260, and also in *Lazarus* v. *Waithman*.

Looking at the subsequent authorities, and at the uniform practice in modern times, I cannot consider this question as res integra, and should not think myself justified in annulling the decisions of so many learned judges, even if I felt that in

(*a*) 5 B. Moore, 313. (*b*) 1 Lev. 173.
(*c*) 4 Bing. 597; 1 M. & P. 541.

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the absence of such decisions my view of the law would probably be different.

But I by no means say that it would be different. The first authority, viz. *Bayly* v. *Banning*, is cited as having determined the point the other way. Now if I am not bound by the several modern decisions on the subject, I certainly am not bound by the authority of *Bayly* v. *Banning*, badly and imperfectly reported as it is in *Lutwyz*, *Siderfin*, and *Comberbach*, and impossible as I find it to satisfy my mind on what ground the court in that case really did proceed. The special verdict in that case, which is an action of trover, against the judgment creditor, and the bailiff of a liberty having the return of writs, is plainly imperfect, for it only finds a demand and refusal, but not a conversion (*a*); whereas it is common learning, that a demand and refusal are evidence only of a conversion, and that the jury must themselves draw the conclusion. Again, the verdict puts the question on the *taking*, and according to the reports it should seem that the court proceeded on the ground that the *taking* was not

(*a*) The following is the effect of the special *postea* in "*Baylis* v. *Bonynge* and *Mawley*," in *K. B.* tried in *London*:—The jurors say, that *Mawley* is not guilty, and say, that a writ of *fi. fa.* against *Eaton* at suit of *Mawley*, tested 4 *June*, but in truth issued 11 *June*, 14 *Car.* 2, was delivered to sheriff on 12 *June* to be executed. That the sheriff issued warrant to *Bonynge*, the bailiff of the said sheriff of the liberty of the hundred of *Polebrooke*. That *Bonynge* on 14 *June* took the goods, which still remain in his hands, not sold or delivered to plaintiff *Mawley*. Jurors also say, that on 17 *July*, on petition of *Baylis* (now plaintiff) and of other creditors of *Eaton*, a commission of bankrupt dated that day issued against him. That on 14 *March*, 15 *Car.* 2, the commissioners assigned the bankrupt's goods to plaintiff for the use of himself and the other creditors. And the jurors say, that after the making the assignment and execution of the *fi. fa.*, and before the exhibition of the bill of the said plaintiff, *plaintiff demanded of defendant Bonynge the monies, goods and chattels in the within written count mentioned, and that the aforesaid Bonynge refused, on his request, to deliver them to plaintiff.* But whether upon all the matters aforesaid, they were well taken by *Bonynge*, by virtue of the aforesaid writ of execution, the jurors are ignorant, and if it shall seem to the court here that such monies, &c., were not rightly taken, then they find that *Bonynge* is guilty, and assess the plaintiff's damages at 160*s.* and 53*s.* costs; but if rightly taken, then they say *Bonynge* is not guilty. See 630, 631, 638.

unlawful, which is frequently not the real point in trover, for the taking may be lawful and yet there may be a subsequent unlawful conversion.

The verdict is general, not guilty, as regards the execution creditor; and rightly so, for it is not found that he interfered in the seizure, and it is expressly found, that the goods still remained in the bailiff's hands, not sold nor delivered over to the execution creditor; and yet *Bayly* v. *Bunning* has been mentioned by *Levinz* as an authority to show that the officer shall not be charged, when perhaps the party shall. So inaccurate are the reports of that day respecting this case, and so conclusive to my mind, that no reliance can be placed on *Bayly* v. *Bunning* as establishing any point at all.

*Lechmere* v. *Thorowgood*, 3 Mod. 326, has been cited, but if possible it is worse reported than *Bayly* v. *Bunning*, and the only point was, that a man shall not be made a trespasser by relation, a point confirmed in *Smith* v. *Milles* (*a*). The decision in the action of trover, *Coles* v. *Davis* (*b*), is but a nisi prius decision.

Take this case then upon legal principles, independent of all authority. The bankrupt acts say, that the commissioners shall deal with all the personal property of the bankrupt, of which no execution is served and executed at the time he becomes bankrupt. How deal with it? By assigning it to the assignees. In order to effectuate this intention of the legislature, it was absolutely necessary to hold, that the property was in the assignees by relation from the time of the act of bankruptcy; otherwise there would have been no mode of recovering the personal property which had been disposed of between the act of bankruptcy and the assignment. This relation is created by the statutes of bankruptcy in effect, as much as if it had been expressly enacted, and manifestly binds all persons except the king, who is not named in those statutes. Now the action of trover, which is the form of the present action, is founded on property, and as the assignees have the property by relation, it follows that they can maintain this action against any person

(*a*) 1 T. R. 475. (*b*) Ld. Raym. 729.

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who has converted the goods in the interval between the act of bankruptcy and the action; subject always to the limitation of two months, introduced by 49 *Geo.* 3. c. 121. s. 2. All the cases from the time of the bankrupt acts of *Elizabeth* and *James* the First show that, and indeed it is on this principle only that the Court of Exchequer in the present case have given judgment against the execution creditor and the bailiff *Ingham*. The action of trespass is very different, it is founded not on property, but on possession; and where there is no actual possession, but right of property is said to draw to it possession, that is only where the plaintiff has a right of possession at the time of the trespass. Here he had no such right, except by relation; and the cases establish, that a man shall not be made a trespasser by relation. There is reason in such rule, for in *trespass* the damages are unlimited, in *trover* they are limited to the value of the property.

It being therefore clear that the plaintiffs had by relation such a property as would maintain trover against all persons but the king, the question in this case is, as it seems to me, reduced to this, whether the character of the sheriff affords a defence to the action? The bankrupt acts contain no clause protecting the sheriff. They speak of all persons being bound who claim under the bankrupt; but it is contended that the sheriff does not claim under the bankrupt; yet it is admitted that the execution creditor who puts the sheriff in motion does claim under the bankrupt, and that the vendee from the sheriff also claims under him. Yet it is said that the sheriff does not. I cannot assent to this doctrine at all. It is said to be hard on the sheriff; but if the law is clear, any hardship arising from it is immaterial, and it is not found practically hard, for the offices of under-sheriff and bound bailiff are coveted notwithstanding the alleged hardship which has prevailed for many years. It is said that the sheriff is invincibly ignorant of the facts; so is the execution creditor, yet he is not excused if he joins in the execution. Ignorance alone, therefore, will not do. Again, the sheriff is often as invincibly ignorant in cases of bills of sale which are set up against executions, and in which the point is, whether they

be fraudulent or not, yet he is obliged to run the risk, nay, more, where he knows of an act of bankruptcy, he is still obliged to seize under a *fi. fa.*, and formerly was obliged to sell, for *non constat* that any commission will issue, which is quite as hard as being obliged to act in ignorance. Whatever hardship he may have been under formerly, he is under very little since 49 *Geo.* 3. c. 121. He can always inquire whether any act of bankruptcy has been committed, and if he has reason to suspect that there has, he can apply to the court for protection for two months, after which he is safe. But it is said that the law in other cases makes a distinction between a sheriff and party; as for instance, that a sheriff may justify under a writ of execution; but the party must show not only a writ, but a subsisting judgment. No doubt that is so, and why? Because the party in the cause who is liable only in case he has been personally active in the seizure, or has taken the goods, or their produce, from the sheriff, yet having put the sheriff in motion, *i. e.* having sued out the writ, if he become liable at all, he must show a cause for suing out the writ, and it is obvious that the writ itself would show no cause. Whereas the sheriff does nothing till after the writ is put into his hands, and professedly in obedience to the writ. The difference in the requisites of a justification between the sheriff and the party arises, not from the character of the sheriff, but from the stage of the proceedings at which they respectively interfere. The writ commands the sheriff to take the goods of *A.*; he takes goods which had been the property of *A.*, and are still in his possession, though in point of law they have ceased to be his property if certain contingent events happen, but no other person has at that time the right of possession. The sheriff therefore is not liable to be sued in trespass by the person who, by the happening of subsequent events, turns out to have had in law the property of the goods at the time of seizure. Neither is the execution creditor liable in trespass, but both the sheriff and the creditor, if he takes the proceeds, are liable in trover to render the value of the goods to the person whose property they turn out to be. I see neither hardship nor injustice in this, nor

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any thing contrary to the usual course and maxims of the law. If this were *res integra*, I should think the sheriff liable; much more do I so think, when I find the modern authorities so deciding, even if I concede and were satisfied, which I am not, that the more ancient ones are the other way.

I am, therefore, of opinion that the judgment of the Court of Exchequer in this case, as regards the defendant *Jewison*, ought to be reversed.

Mr. Justice TAUNTON.—Two questions have been raised on behalf of the defendants in error in this case, the one, that the property in the goods and chattels seized remained in the bankrupts, *Bankhart* and *Benson*, until the assignment by the commissioners under the commission of bankrupt; that at the time of the seizure, therefore, they were their goods and chattels; that in making the seizure, *Jewison*, the chief bailiff of the honor, and *Ingham* his deputy, were acting in strict obedience to the writ of *fieri facias*, which commanded them of the goods and chattels of *Bankhart* and *Benson* to make the money to be levied; and therefore that *Jewison* (for of *Ingham* there was no question, in consequence of his having taken an indemnity from the judgment creditors,) is not liable to this action. The other question was, whether, admitting the doctrine of relation to be applicable to the judgment creditors, it could be so with respect to *Jewison*, who was a public officer, and supposed to be entitled to peculiar protection, and not capable of being considered as a wrong-doer, when acting in obedience to his writ and in ignorance of any act of bankruptcy committed. If either of these questions be answered in favour of the defendants in error, the judgment ought to be affirmed; but upon a full consideration of the subject I am of opinion that both points are against them, and that the judgment of the court below ought to be reversed.

In giving my reasons for the conclusion at which I have arrived, I do not mean to go into the cases at any length. They are so fully discussed in the very learned and elabo-

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rate judgment of the Court of Exchequer, and in the arguments at the bar, and the subject itself, speaking generally, is so familiar to the mind of every lawyer, that this is wholly unnecessary.

Upon the first point I admit that the property in the goods, according to the case of *Cary* v. *Crisp* (*a*), is not transferred out of the bankrupt before assignment by the commissioners; but though this be so, it is most clear, and has been settled by a long series of decisions, that when an assignment is made under a good commission of bankruptcy, it relates back to the act of bankruptcy committed, and avoids all mesne acts. The law on this subject is thus stated by Lord *Hardwicke* in the case of *Billon* v. *Hyde* (*b*). "By the act of bankruptcy all the real and personal estate vested in the assignees, and the property vested in them from the time of the act committed; and that may go back to a great length of time, and it overcharges all those acts without regard to the fairness or fraud in them. So that a sale of goods by the bankrupt after the act committed is a sale of their property; for which they may maintain trover. So it is as to the payment of money, and this was the intent of the act of parliament, the statute of *Jac.* 1. c. 19. s. 14. being, that this shall not extend to the prejudice of any debtor of the bankrupt who paid his debt after the act committed without knowing of it. This relation the assignment has, it does not only overcharge acts done in pais and contracts entered into by such persons having committed an act of bankruptcy, but also acts on record, and legal acts done by him, such as judgments; so that if execution is taken out after the act committed upon a judgment before, that execution is undone and set aside. It is said that this rule, founded on this act of parliament, is contrary to the general reason of the law, which says, that fictions of law and legal relations shall not enure to the wrong of any one, which is a general rule invented to support the right and equity of the case. But the reason of taking this case out of that rule is plainly this, and the

(*a*) 1 Salk. 108. (*b*) 1 Ves. 328.

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law did intend it on this general rule, that it is better to suffer a particular mischief than an inconvenience, and the legislature foresaw there would be a particular mischief which they cured by that proviso, but did not extend it farther, because the inconvenience, on the other hand, of suffering bankrupts to dispose of their effects by contracts or judgments would put it in their power to defeat their just creditors of their debts, so as it would be difficult commonly to find out whether there was a mixture of fraud, the legislature thought it better to lay down that general rule." Lord *Mansfield*, in *Cooper* and another v. *Chitty* (*a*), expresses himself in these words: "This relation the statutes concerning bankrupts introduced to avoid frauds. They vest in the assignees all the property that the bankrupt had at the time of what I may call the crime committed, (for the old statutes consider him as a criminal,) they make the sale by the commissioners good against all persons who claim by, from, or under the bankrupt after the act of bankruptcy, and against all executions not served and executed before the act of bankruptcy." It must be particularly recollected that this relation takes effect, not from the common law, but by statute, and the necessary result is, that though at the time of the execution executed goods seized under an execution may ostensibly have been the goods of the bankrupt, and in truth would have been and have continued to be so notwithstanding a prior act of bankruptcy committed, if no commission was sued out thereon, yet if a good commission be taken out, and an assignment executed, whoever possesses himself thereof at any interval of time between the act of bankruptcy and the assignment, is considered as possessing himself of the property of the assignees. He, therefore, whether judgment creditor, or sheriff, or bailiff, or any other person who in such case takes the goods apparently of *A.* the bankrupt, has in legal effect taken possession of the goods of *B.* the person who afterwards becomes assignee, and is liable to an action at the suit of *B.*, the subsequent assignee, for so doing, unless he be protected by some peculiar privilege.

(*a*) 1 Burr. 31.

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This brings me to the second question, whether a sheriff has such a privilege, so that under the same circumstances, ignorance of any act of bankruptcy committed being one, the judgment creditor will be liable, and the sheriff will not. It is said that he has, because he is the king's officer, and that he is acting only in obedience to the writ, which he is obliged to execute. Now if there be an exception to the general rule in the instance of a sheriff, it is an implied one, for there is none to be found in the statute. The words of 6 *Geo.* 4. c. 16. s. 12. which are the same as those in 13 *Eliz.* c. 7. s. 2. are general, that the commissioners shall have full power and authority to take order and direction of all the bankrupt's lands which he shall have in his own right before he became bankrupt, and of all his money, goods, chattels, &c., and to make sale thereof, or otherwise order the same, for satisfaction and payment of the creditors. I confess I can see no necessity for making this exception in favour of the sheriff. He is the immediate officer of the king and all his courts, to execute the writs of the common law, and for doing this he is entitled, on the one hand, to certain allowances and fees, and subject, on the other, to many perils and liabilities; and to these perils and liabilities, though they may in particular instances work great injustice, he is exposed for the public good. If we were to confine the liabilities of sheriffs to cases of personal misconduct or default in them or their officers, we should overturn the settled administration of law upon this subject, and throw every thing into confusion. Nothing can be more severe than the responsibility of a sheriff in the case of bail. If he refuses sufficient bail he may have an action brought against him by the defendant; and if he takes it, and the defendant in the suit does not appear according to the exigency of the writ, which he can only do by putting in and justifying bail above, he may be attached by the plaintiff. So he is identified with his bailiffs, and liable for all their acts, though beyond the scope of their authority and contrary to their duty, as voluntary escapes, extortion, and the like. In the one instance, without the means of knowledge, he is bound to judge of the sufficiency of persons

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tendering themselves as bail; and in the other he is driven to protect himself by a bond from sureties for the good conduct of his officers, and to rely upon such security, which may turn out to be worthless. So in executing process, whether against the person or against goods, he acts at his peril, and is responsible if he makes any mistake, however innocently, with respect to the identity or the property. This has been carried so far, that in a case where he had seized goods under a *fi. fa.* against *A.* in a house where *A.* and the plaintiff lived together as man and wife, and the plaintiff afterwards discovered that when she intermarried with *A.* he had another wife living, it was held that the plaintiff might recover the value of the goods against the sheriff, they having been her property before the marriage, it not appearing that the plaintiff knew at the time of the execution that *A.* had another wife living; *Glasspoole* v. *Young* and Others(*a*). All this apparent injustice has its origin in, and can be excused only by the apprehension of the numberless frauds, oppressions and inconveniences that would otherwise ensue. But in favour of the sheriff upon this occasion, the case of *Bayly* v. *Bunning* (*b*) has been cited. I admit this case, as reported in *Lev.* to be *primâ facie* an authority for the sheriff, though in *Sid.* the reporter subjoins a query, with this remark—"For it was affirmed that the practice is, that the bailiff shall be found guilty if the party was then a bankrupt." But it may be observed, that this appears to have been the first case decided upon this point of relation after the statutes 13 *Eliz.*, 1 *Jac.* 1, and 21 *Jac.* 1, and was decided at a time when the bankrupt law was not moulded, partly by decisions of courts of justice, and partly by subsequent statutes, into that more perfect system which it afterwards attained. It is still more material to observe, that on referring to the original record, it appears that the special verdict does not expressly find any conversion by the defendant *Bonynge.* The action was trover against the judgment creditor *Mawley* and the officer *Bonynge.* The former was found not guilty; and with respect to the latter, the jury

(*a*) 9 B. & C. 696. (*b*) 1 Lev. 173: Sid. 271.

found that by virtue of the warrant and writ he caused to be made the goods, chattels and monies in the count mentioned, and which goods, chattels and monies still remain in the hands of the said *Thomas Bonynge*, neither sold nor delivered to the said *William Mawley*. They afterwards further said, that *Richard Bayliss* (the plaintiff) demanded of the said *Thomas Bonynge* the monies, goods and chattels in the count mentioned, and that *Thomas Bonynge* refused upon his request to deliver them to *Bayliss*. But whether upon all the matters found, the monies, goods and chattels aforesaid were well *taken* by *Bonynge*, by virtue of the writ of execution, the jurors are ignorant, and pray the advice and consideration of the court; and if it shall seem to the court they were not rightly, then *Thomas Bonynge* is guilty of the premises laid to his charge; but if rightly taken, then not guilty. A demand and refusal, therefore, are found, but no sale nor express conversion, and the question referred to the court is merely as to the taking. This I think considerably impugns the authority of the case, inasmuch as the conversion, which is the gist of the action, is not found; and from the contradictory accounts of the several reports of this case, it is difficult to ascertain the ground of the decision.—The case of *Turner* v. *Felgate* (*a*) was also cited, as illustrating by the reporter's note, and not by the decision itself, the difference between charging the officer and charging the party. It was there held, though *Twisden* was not satisfied, that the party who levied upon a judgment that was afterwards vacated was a trespasser by relation. This was the only point decided, and the reporter subjoins a note of observation, that the action was brought against the party, and not against the sheriff, who had the king's writ for his guarantee, and refers to *Bayly* and *Bunning's* case. This case, therefore, and that also of *Phillips* v. *Thompson* (*b*), in which the ground of the decision in *Bayly* v. *Bunning* is simply stated, are not additional authorities, because this very point was not adjudged in either. Of *Lechmere* v. *Thorogood* (*c*), it is sufficient to say

(*a*) 1 Lev. 95. (*b*) 3 Lev. 193.

(*c*) 3 Mod. 236; 1 Show. 12 ; and Comb. 123.

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the absence of such decisions my view of the law would probably be different.

But I by no means say that it would be different. The first authority, viz. *Bayly* v. *Bunning*, is cited as having determined the point the other way. Now if I am not bound by the several modern decisions on the subject, I certainly am not bound by the authority of *Bayly* v. *Bunning*, badly and imperfectly reported as it is in *Lettinz*, *Siderfin*, and *Comberbach*, and impossible as I find it to satisfy my mind on what ground the court in that case really did proceed. The special verdict in that case, which is an action of trover, against the judgment creditor, and the bailiff of a liberty having the return of writs, is plainly imperfect, for it only finds a demand and refusal, but not a conversion (*a*); whereas it is common learning, that a demand and refusal are evidence only of a conversion, and that the jury must themselves draw the conclusion. Again, the verdict puts the question on the *taking*, and according to the reports it should seem that the court proceeded on the ground that the *taking* was not

(*a*) The following is the effect of the special *postea* in "*Baylis* v. *Bonynge* and *Mawley*," in *K. B.* tried in *London*:—The jurors say, that *Mawley* is not guilty, and say, that a writ of *fi. fa.* against *Eaton* at suit of *Mawley*, tested 4 *June*, but in truth issued 11 *June*, 14 *Car.* 2, was delivered to sheriff on 12 *June* to be executed. That the sheriff issued warrant to *Bonynge*, the bailiff of the said sheriff of the liberty of the hundred of *Polebrooke*. That *Bonynge* on 14 *June* took the goods, which still remain in his hands, not sold or delivered to plaintiff *Mawley*. Jurors also say, that on 17 *July*, on petition of *Baylis* (now plaintiff) and of other creditors of *Eaton*, a commission of bankrupt dated that day issued against him. That on 14 *March*, 15 *Car.* 2, the commissioners assigned the bankrupt's goods to plaintiff for the use of himself and the other creditors. And the jurors say, that after the making the assignment and execution of the *fi. fa.*, and before the exhibition of the bill of the said plaintiff, *plaintiff demanded of defendant Bonynge the monies, goods and chattels in the within written count mentioned, and that the aforesaid Bonynge refused, on his request, to deliver them to plaintiff.* But whether upon all the matters aforesaid, they were well taken by *Bonynge*, by virtue of the aforesaid writ of execution, the jurors are ignorant, and if it shall seem to the court here that such monies, &c., were not rightly taken, then they find that *Bonynge* is guilty, and assess the plaintiff's damages at 160*s.* and 53*s.* costs; but if rightly taken, then they say *Bonynge* is not guilty. See 630, 631, 638.

unlawful, which is frequently not the real point in trover, for the taking may be lawful and yet there may be a subsequent unlawful conversion.

The verdict is general, not guilty, as regards the execution creditor; and rightly so, for it is not found that he interfered in the seizure, and it is expressly found, that the goods still remained in the bailiff's hands, not sold nor delivered over to the execution creditor; and yet *Bayly* v. *Bunning* has been mentioned by *Levinz* as an authority to show that the officer shall not be charged, when perhaps the party shall. So inaccurate are the reports of that day respecting this case, and so conclusive to my mind, that no reliance can be placed on *Bayly* v. *Bunning* as establishing any point at all.

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Take this case then upon legal principles, independent of all authority. The bankrupt acts say, that the commissioners shall deal with all the personal property of the bankrupt, of which no execution is served and executed at the time he becomes bankrupt. How deal with it? By assigning it to the assignees. In order to effectuate this intention of the legislature, it was absolutely necessary to hold, that the property was in the assignees by relation from the time of the act of bankruptcy; otherwise there would have been no mode of recovering the personal property which had been disposed of between the act of bankruptcy and the assignment. This relation is created by the statutes of bankruptcy in effect, as much as if it had been expressly enacted, and manifestly binds all persons except the king, who is not named in those statutes. Now the action of trover, which is the form of the present action, is founded on property, and as the assignees have the property by relation, it follows that they can maintain this action against any person

(*a*) 1 T. R. 475. (*b*) Ld. Raym. 729.

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(*a*) 1 T. R. 475. (*b*) Ld. Raym. 729.

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The right of the trader to his own property is a defeasible right. Till the commission issues, the property remains in him; but he holds it from the time of the act of bankruptcy, liable to be defeated by the proceedings under a commission, and subject to the rights, which, in the event of a commission, the assignees may acquire to it. In the mean time, this possibility of a right accruing to assignees under a commission, affords no legal answer to a sheriff for not executing the writ directed to him: but if he has reason to apprehend a commission, he may ask for an indemnity, and in case a satisfactory one be not given, he may apply to the court for time to return the writ, till it can be ascertained whether a commission is intended to be issued. Some risk, indeed, will be incurred by the sheriff, and if he is necessarily to be protected from all risk, an exception in his favour must be implied by law. But it is to be recollected that the office of sheriff is in its nature an office of risk. It is not for us now to consider whether the policy of the law, which has made it so, is or is not founded on wise principles. But so the law has made it, and so it must be treated in courts of justice. The sheriff is bound by statute to permit a defendant, who is arrested, to go at large upon bail; yet if bail, apparently or even actually responsible at the time, become insolvent before the return of the writ, the sheriff must render the defendant or pay the debt. This is a hardship upon the sheriff, imposed by the operation of the statute *Hen.* 6. No difficulty, however, is found in obtaining persons willing to undergo this responsibility: the office being an office of profit as well as of risk. If, therefore, the liability of the sheriff in the present case were now to be considered for the first time, I think that his title to an exemption from the general operation of the bankruptcy law would be very far from clear. To me, however, it appears that the question ought not at the present day to be considered as open to discussion. The interpretation of the statute law, as well as of the common law, is to be sought for in the doctrines promulgated and acted upon in courts of justice. It may be admitted, indeed, that the express provisions of a statute can-

not be overturned by the authority of a court, but upon the propriety of admitting an implied exception, in the absence of express words, the authority of the courts has the same weight as upon questions of common law: their decisions give the rule by which the profession is guided in advising parties upon their respective rights; and to question their correctness, after they have been recognized and acted upon for a long series of years, is not only to introduce uncertainty upon the point under immediate consideration, but to encourage resistance to established rules, by holding out to ingenious persons a prospect of overturning them upon subtle and refined distinctions. If the judgment in *Cooper* v. *Chitty* be considered with reference to the facts of that case only, it will not amount to an authority upon the point now under discussion, since it appears that the sale by the sheriff took place not only after the date of the commission but after the assignment. But the authority of considered judgments is not to be confined to the point actually adjudged. The reasoning of Lord *Mansfield*, in delivering the judgment of the court, appears to take a wider range than the particular facts of the case required. He begins by saying that the law defining the action of trover, and the grounds upon which the plaintiff is entitled to recover in it, will go a great way towards the understanding, and consequently towards the solution, of the question in that particular case. In form, he says, it is a fiction—in substance, a remedy to recover the value of personal chattels converted by another to his own use; that it lies in many cases where the defendant has got the possession lawfully; that two things are necessary to be proved, property in the plaintiff and a wrongful conversion by the defendant.

After laying it down that dispositions by process of law are upon the same footing with dispositions by the party; and that to be vested they must be completed before the act of bankruptcy, he says, "Therefore as to the first point, it is not clear that the property was in the plaintiff as and from the 4th *December*, when the act of bankruptcy was committed. 2dly. The only question there is, whether the de-

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fendant is guilty of wrongful conversion. That the conversion itself was wrongful is manifest. The sheriff had no authority to sell the goods of the plaintiff, but of *John* only."

Here the right to the property disposed of is made the test of the wrongful conversion. Lord *Mansfield* then proceeds to consider whether the defendant was excusable, though the act of conversion was wrongful. As to which, he says, "Though the statutes rescind contracts and executions not complete before the act of bankruptcy, they do not make men *trespassers* or *criminals* by relation. But the injury complained of (that is, in the action of trover) is the wrongful conversion. The sheriff acts at his peril and is answerable for all mistakes. None of the cases authorize the sheriff to sell the goods of a third person." Here the distinction between trespass and trover appears to be distinctly taken. The injury complained of in trespass is the unlawful force: in trover the wrongful conversion of property. The mere act of force is *excused* if committed before an assignment in fact; but if a conversion takes place, the person to whom the law ascribes the property, is entitled to a compensation for his loss, from the person, whoever he may be, that has converted his property.

It had been determined in the case of *Bayly* v. *Bunning* (*a*), that a sheriff, who had taken goods in execution after an act of bankruptcy, was not liable to the assignees in an action of trover. The dates and special finding of the jury, as they appear upon the special verdict, have been already stated (*b*). It is very material to observe that in this case there was no sale; nothing was done with respect to the goods beyond the first taking possession under the writ by the officer, in whose hands they still remained when the action was brought, and the sole question referred to the court by the jury was, whether this taking amounted to a conversion: the defendant was entitled to a verdict, for the demand and refusal stated in the special verdict, though evidence of a conversion, could not be taken to amount to an actual conversion; a point which had

(*a*) 16 Car. 2. Reported 1 Lev. 173; 1 Sid. 272; 2 Keb. 32.

(*b*) See *ante*, 622, 630, 631.

been settled long before the case in question, having been laid down as clear in 10 *Coke's Reports*, 56, 57, the case of *The Chancellor of Oxford*. According to the report in *Levinz*, *Wyndham* said, that notwithstanding the serving of the writ, the goods are subject to the disposal of the commissioners; but he, *Twysden*, and *Kelynge*, all agree that the issue was found for the defendant; for the *taking* by him was lawful by virtue of the writ. *Siderfin* says, the court delivered their opinion that the goods were liable from the time of the teste of the *fi. fa.*; and this shall be said to be *emanatio brevis*, although it was in fact at another time. And as to the other point they were clearly of opinion that the bailiff was not liable in *trover*, for that the sheriff (*as the case is found*) *took* the goods lawfully. According to *Keble*, *Keeling*, C. J., said the special conclusion being on the *taking*, the officer *is not punishable*.

The case of *Bayly* v. *Bunning*, therefore, is not an authority for the sheriff where there has been an actual sale: and so Lord *Mansfield* appears clearly to have thought. And with respect even to the original taking, that case is distinguishable from executions of a later date. For though the writ of *fi. fa.* had been delivered to the sheriff after an act of bankruptcy, it was tested before, and having been issued in a case which occurred before the statute, 29 *Car.* 2. c. 3. did then bind the goods from the teste, upon which point much reliance was placed: accordingly Lord *Mansfield* observes, that in the case of *Bayly* v. *Bunning*, the goods were clearly bound by the teste, and then adds, "the question referred by the special verdict was upon the *taking*, viz. whether the party was guilty on the taking, and the court excuse the bailiff for his innocent executing of the writ."— The act of taking seems to have been treated as an act of excusable trespass, either on account of the teste, or the character of the officer; and independently of the taking, there was no conversion.

It is remarkable that *Siderfin*, after stating the argument for the bailiff, that he ought not to be found guilty, because he had only performed his duty, and not converted the

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goods to his own use, adds, "*Quære*, for it was affirmed that the practice is, that the bailiff shall be found guilty if the party was then a bankrupt."

It is said in Lord *Raymond*'s Rep. 724, to have been ruled by Lord *Holt*, C. J. at *nisi prius*, 10 *Will.* 3. if after a bankruptcy the sheriff upon a writ of *fi. fa.* seizes the goods and *sells them*, and a commission of bankruptcy is granted, the assignee of the commission may maintain trover against the vendee of the goods, *but no action will lie against the sheriff, because he obeyed the writ.* The latter part of this proposition is the very point now contended for, to which it appears, from his remarks on Lord *Raymond*'s notes, that Lord *Mansfield* did not assent. He says, the notes were taken when Lord *Raymond* was young, as short notes for his own use; and are too incorrect and inaccurate to be relied on as authorities; that it might not at all be material to attend to the distinction between trespass and trover; that the passage in question was a loose note of what was said *obiter*, and manifestly refers to the case of *Bayly* v. *Bunning*; but is no authority in the present case.

It must be admitted, however, that Lord *Mansfield*, in several parts of his judgment, notices and avails himself of the sale in *Cooper* v. *Chitty* being subsequent to the commission and assignment. Thus in commenting upon *Cole* v. *Davies*, he says, "Besides, the case there put is of a sale by *the sheriff, before the commission, and the conversion* might be as excusable as the taking, because he obeyed the writ, whereas here the goods were not sold till after both commission and assignment." Again, "the taking in *Cooper* v. *Chitty* was innocent, and in that sense lawful, but as a ground to support a conversion by sale after a commission publicly taken out, and an actual assignment made, it was not lawful"—and at the conclusion, "the gist of this action is the wrongful conversion by the sale and false return long *after* the commission and assignment."

A question might, therefore, fairly be raised, whether the proposition ascribed to Lord *Holt* was intended to be denied by Lord *Mansfield*, or only to be distinguished from the case

in judgment. It is scarcely possible that such a point should be long suffered to remain in doubt, since it must have been of frequent occurrence; and if the general reasoning of Lord *Mansfield*, and his particular observation respecting Lord *Raymond*'s note, have from the year 1756 been treated in practice and in judgment as contradictory to the point therein stated, the point ought to be considered as overruled. Two passages, apparently inconsistent with each other, have been cited on the authority of Sir *William Blackstone*. In his report of *Cooper* v. *Chitty*, he states Lord *Mansfield* to have said, "But had the sale been immediately after the seizure, still the sheriff would have been liable; and in his report of *Timbrel* v. *Mills*, he states that the whole Court declared that it was allowed in *Cooper* v. *Chitty*, that if the sheriff levies the money and pays it to the plaintiff, before any commission issued and without notice of the act of bankruptcy, he will at all events be safe." It is not likely that both these passages should have been uttered by Lord *Mansfield* upon the same occasion; and as no notice is taken of either of them, either in the report of Sir *James Burrow*, or in that of Lord *Kenyon*, little reliance can be placed upon them. No question appears to have been raised respecting the effect of the judgment in *Cooper* v. *Chitty*, till in the year 1807, in the case of *Potter* v. *Starkie*. But in the mean time we find the principle supposed to be established stated in practical books, and assumed in courts of justice. In the editions of *Cooke*'s Bankrupt Law, published many years before the case of *Potter* v. *Starkie*, it is said "the sheriff who executed a *fi. fa.* upon the bankrupt's goods, after act of bankruptcy committed and before the issuing of a commission, is not a trespasser, but the assignees may maintain trover against him." In *Gwillim*'s edition of *Bacon*'s Abridgment, published in 1798, tit. Bankrupt, it is said "It seemeth to have been formerly very much doubted whether the assignees could maintain any action against an officer who had the goods of a bankrupt in execution, after an act of bankruptcy and before the issuing a commission; but it is now *settled* the assignees may in such case bring trover

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against him, though the relation shall not operate to make him a trespasser."

The distinction with respect to the liability of the sheriff in trover, though exempt from an action of trespass, has been expressly recognized in 1786, in *Smith* v. *Mills* (*a*), as established by *Cooper* v. *Chitty*.

In *Hitchin* v. *Campbell* (*b*), only sixteen years after *Cooper* v. *Chitty*, which was an action of indebitatus assumpsit against an execution creditor for the amount of debt levied after the act of bankruptcy, but before the commission, *De Grey*, Lord Chief Justice, in delivering the opinion of the judges, (of whom Sir *W. Blackstone*, who reports the case, was one,) says "that the legal effect of an act of bankruptcy committed by a trader, is to put it in the power of the commissioners by relation to divest the property of the bankrupt from that time, in case a commission is afterwards issued." This relation takes place in every instance but those excepted by the stats. 1 *Jac.* 1, 21 *Jac.* 1, and 19 *Geo.* 2; executions are not among those excepted cases, but are expressly declared void by the stat. 21 *Jac.* 1. Yet notwithstanding this transfer of the property by relation the sheriff is certainly *no trespasser* by taking the goods in execution after the act of bankruptcy and before the commission issued. So ruled in *Lechmere* v. *Thorogood* (*c*), and in *Cooper* v. *Chitty* (*d*). But by *selling* the sheriff *converts* the goods, and then *trover* is maintainable against the sheriff, or his vendee, or the plaintiff in the original action." A former action had been brought in trover against the sheriff and the defendant, in which there was a verdict and judgment for the defendant, as to which action the chief justice observed, "as there was clearly a *conversion* before the act of trover, the only question could be on the property; thereby intimating that if the goods belonged to the bankrupt there could be no defence. And according to the report of the same case, 3 *Wilson*, 308, the court says the action brought against the sheriff of Surrey and the defendant to recover the value

(*a*) 1 T. R. 4. (*b*) 2 Bla. Rep. 829, T. T. 18 *Geo.* 3.
(*c*) Comb. 123, 1 Show 12, 3 Mod. 236.
(*d*) 1 Bla. 65, 1 Ken. 395, 1 Burr. 20.

taken in execution, was well laid." In the case of *Menham* v. *Edmonson* (*a*), the act of bankruptcy took place in *December* 1796, the execution on 30 *March* 1797, and the commission issued in the *June* following. The execution creditor having accompanied the sheriff's officer at the time of the execution, he was sued by the assignees in trover, and it being objected that the action should have been brought against the sheriff, in whose hands the money remained, it was not contended that the action might not have been maintained against *him*. *Eyre* C. J. after stating that he had some doubt at first whether the action should not have been brought for the money, as the execution had been regularly made under the authority of the law, and the goods regularly sold, observed "there is a fact however in this case which decides the point, *viz.* that the defendant was in company with the sheriff's officer at the time of the execution. By the case cited (*b*) it appears that trover may be maintained against the party himself if he give bond to the sheriff, because that is equal to intermeddling; actual intermeddling therefore must be equal to giving a bond." Here the liability of the sheriff himself seems to have been assumed, and the participation of the defendant in his act is stated as the ground of his liability. In the year 1807 the point now in question was distinctly made before Mr. Baron *Wood*, in *Potter* v. *Starkie*, and that judge, whose practical experience as well as learning are well known, held the sheriff liable, in which he was confirmed by the Court of Exchequer. Eight years after this the case of *Wyat* v. *Blades* (*c*) occurred before Lord *Ellenborough*, in which the act of bankruptcy having taken place on the 8th *December*, the goods were seized and carried to a broker on the 8th *February*, and the commission issued on the 12th of the same month; and Lord *Ellenborough* held, in trover against the sheriff, that the removal was a sufficient conversion to support the action, though the goods were never sold, but remained at the broker's in consequence of a notice *not to sell*; and though no demand of

(*a*) 1 Bos. & P. 369. (*b*) *Rust* v. *Baker*, Str. 996.
(*c*) 3 Campb. 396.

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the goods had been made, no objection was made to the liability of the sheriff to answer for the conversion. In 1821, eight years after that, the point was again raised in *Lazarus* v. *Waithman* (*a*), in the time of Lord Chief Justice *Dallas*, when the Court of Common Pleas, after an argument in which *Bayly* v. *Bunning* and other old cases were cited, decided against the sheriff, Mr. Justice *Burrough* saying, that the point was settled long before he knew Westminster Hall. Again in 1828, in *Price* v. *Helyar* (*b*), in the time of Lord Chief Justice *Best*, the same court came to a similar determination. The judgment of that court in *Carlisle* v. *Garland*, (*c*) in 1831, in the time of the present Lord Chief Justice, was conformable to the former decisions. Finally, in the same year 1831, the Court of King's Bench in *Dillon* v. *Langley* (*d*), also decided in the same manner against the sheriff. Upon that occasion the noble and learned lord whose loss we so recently have had occasion to deplore (Lord *Tenterden*) expressed the opinion of the court in the terms which I desire to adopt, and with which I shall now conclude. "He (the sheriff) must obey the writ, but he is also required to know whose goods he takes. I think in this case we ought to say that we consider ourselves bound by the many decisions which have taken place establishing the liability of the sheriff."

I am of opinion that the judgment of the Court of Exchequer for the defendant *Jewison* ought to be reversed.

Mr. Justice GASELEE.—Upon the best consideration I have been able to give to this case, I am of opinion that the judgment of the Court of Exchequer ought to be affirmed; and although I am sorry to have the misfortune of differing from those of my learned brothers who have preceded me, and also of those who are to succeed me upon this occasion, it is a matter of great consolation to me that I am supported by the unanimous opinion of the Court of Exchequer.

The reasons upon which that judgment is founded are so fully, and to me so satisfactorily stated by the Lord Chief Baron's

(*a*) 5 B. Moore, 313. (*b*) 4 Bing. 597.
(*c*) 7 Bing. 298. (*d*) 2 Bar. & Ad. 121.

judgment, in the reports of the case in 2 *Tyrwhitt*, 17, and 2 *Crompton* and *Jervis*, that I should consider myself guilty of an unnecessary waste of time were I to repeat them here. I should run a considerable risk of weakening their impression were I to attempt to state them in any other terms. There is certainly great weight in the argument that the decisions in *Cooper* and *Chitty*, and many more recent cases, are contradictory to that of the Court of Exchequer; and if they had corresponded with the older cases, so that there had been a constant course of decision in the same way, I should have very much hesitated before venturing to break in upon it; and it is to that consideration I attribute my having concurred in the judgment given by the Court of Common Pleas, in the case of *Price* v. *Helyar*, having always considered that if the case were a new one, the sheriff was undoubtedly entitled to protection. Independently, however, of the circumstance that in the case of *Cooper* v. *Chitty*, and many of the subsequent ones, the acts of the sheriff after he had notice of the bankruptcy were sufficient to support the decision of those cases, it appears to me that the earlier cases are authorities in favour of the sheriff, and therefore that in affirming the judgment of the Court of Exchequer on this occasion, we should not be overturning the constant course of the authorities upon the subject, but restoring the law as it was laid down and acted upon in the reign of *Charles II.* and from thence downwards to the time of the decision in the case of *Cooper* v. *Chitty*. Upon considering the several reports of the case of *Bayly* v. *Bunning*, it is not quite clear that the allegation in the judgment of the Court of Exchequer, that in deciding the case of *Bayly* v. *Bunning*, the court disallowed the objections that the goods were to be considered as bound by the teste of the writ of execution, which was before the act of bankruptcy, and allowed the other objection, *viz.* that the taking was lawful in respect of the characters of the persons by whom it was made, is quite accurate; for although the latter was clearly one of the grounds of the decision, it is not so clear that it was the only one.

The report in *Levinz* concludes thus—"And afterwards in

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*Easter* term, 18 *Car.* 2, judgment was given for the defendant, he being an officer, obliged to execute the writ, who could not be aware of any acts of bankruptcy, or know that any of them would be acted upon." The report in *Siderfin* states, that the court as to the other points, *viz.* the character of the sheriff, were clear that the bailiff is not guilty of *trover*, for that the sheriff took back the goods lawfully.

During the argument of this case in the Court of Error, a doubt was thrown out whether the case of *Bayly* v. *Banning* was an action of trover, and it was suggested that it might be an action of trespass, and so reconcile all the cases. The original roll has therefore been inspected, and it thereby clearly appears that the form of action was trover.

Mr. Justice LITTLEDALE.—It is admitted on all hands that, as far as relates to the judgment creditor, if he interferes in the sale, or receives the produce after the sale, and also as to the vendee of the sheriff or other officer, that the goods of the bankrupt are, upon the assignment to the assignees, vested in them by relation to the act of bankruptcy, so as to avoid all mesne acts and dispositions; and that, both upon the words of the acts of parliament, the uniform construction that has been put upon those acts, and the policy of the bankrupt laws: and therefore I do not think it necessary to advert to any authorities as to the ground or effect of relations either at common law or by any acts of parliament. The words of the act of parliament relating to bankruptcy are general, and make no exceptions as to the persons to be bound, only, indeed, that as the king is not named in them, they do not affect the crown till there is an actual assignment of the property. But it is contended on the behalf of the defendant, that he is to be exempted from liability for seizing and selling, if he has no notice of an act of bankruptcy; and he contends this upon two grounds—1st. That the older statutes of 33 & 34 *Hen.* 8. c. 4., 13 *Eliz.* c. 7., 1 *James* 1. c. 19., and 5 *Geo.* 2. c. 30., do not extend to the sheriff at all, and that the last statute, 6 *Geo.* 4. c. 16., does not increase the liability of the sheriff. The statute of *Hen.* 8. says, the sale by the

commissioners shall be good and effectual against bankrupts, their heirs and executors, as though the sale had been made by the bankrupt at his own free will and liberty. The 13 *Eliz.* c. 7. s. 2. says, the sale by the commissioners shall be good and effectual against (after an enumeration of various descriptions of persons) all other persons claiming by, from, or under the bankrupt, by any act had, made or done after he shall become bankrupt. The other acts of 1 *James* 1., 19 *James* 1. and 5 *Geo.* 2. as to the sale or assignment by the commissioners, all refer to the statute of *Eliz.*, and no fresh powers are given to the commissioners, except that the 26th section of 5 *Geo.* 2. directs the commissioners to assign to the assignee for the general benefit of creditors who prove their debts. But I think that the words of the statute of *Eliz.* are sufficient to bind the sheriff; for though he does not claim as to any beneficial interest from the bankrupt, yet he claims to *sell* for the purpose of paying over the proceeds to the creditors of the bankrupt, and the person to whom he sells certainly claims under the bankruptcy; and it would be somewhat extraordinary if the sheriff, who sells under such circumstances, was to be excepted out of the operation of the statute. I may observe, that I am not aware that this point has ever been raised before, which, if there had been any ground for it, would surely have been done, considering the great variety of cases in which this subject has been agitated for the last 170 years. The statute of 6 *Geo.* 4. c. 16. is differently expressed from the former acts. In the 12th section it says, the commissioners are to assign in manner after directed; and then the manner is directed in the 63d section, which contains no such words as are contended to be a limitation of the person bound. But I do not consider whether this enlarges the power of the commissioners or not, because I think the former acts extend to sheriffs and other similar public officers.

But it is said the law will make an implied exception in favour of the sheriff, or other persons having the execution of process, because they are bound to obey the king's writ; and that it would be very hard to make him liable to an action when he acts according to the best of

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his judgment, and he has no means of ascertaining whether the debtor has or has not committed an act of bankruptcy. With regard to his being a public officer, and that he is bound to carry the king's writ, there is no doubt but he is, and in the execution of that duty he ought to be protected. But the question is, does he act in obedience to the king's writ? That commands him to take the goods of *A.*; but how can they be said to be goods of *A.* when *A.* himself has lost the power of continuing his property, and when the judgment creditor has no right to have them as the goods of *A.*, and when the persons to whom the sheriff will sell have no such right? And the result therefore is, that instead of seizing the goods of *A.* he seizes the goods of the assignees. But it may be said they are the goods of *A.*; that he has acquired them; that he is in possession—treats them as his own; and no other person has yet acquired a right to them. But by the act of bankruptcy there is a sort of stamp or mark fixed upon them, which, though invisible at first, is afterwards brought into light by the commission, and attaches upon them so as to destroy all property in the bankrupt; which destruction of property, though not apparent at the time of the levy, afterwards, when the commission and assignment take place, operates in the same way as if the whole had been known at first.

As to the hardship upon the sheriff, the general policy of the bankrupt laws makes many things apparently hard. It is very hard that if a man who owes a trader money, and pays it to him *bonâ fide* in the regular course of business, without any suspicion of an act of bankruptcy;—or if a bankrupt owes money, which he pays to a creditor in the ordinary course of business, he having no suspicion that an act of bankruptcy has been committed;—or if a trader sells his estate after having committed a secret act of bankruptcy;—that all these transactions should be rendered invalid by the general operations of the bankrupt laws; yet it is only by several particular acts of parliament, applicable to these various cases, that the various things which I have enumerated are corrected or modified. It is a hardship on a sheriff if he seizes goods of which the debtor is in possession

and apparent ownership, and it should turn out that the possession and apparent ownership was not fraudulent, that the sheriff should be liable; and yet the circumstances may be such as that the sheriff has no means of ascertaining the ownership. I think the hardship of a case ought not to form a principle on which the law should act. Society is so formed that many persons fill relations which appear to endure great hardships. If these hardships be of sufficient importance for the legislature to interfere, they will do so; or if brought before the court, they will frequently interfere, so as to relieve the sheriff, if the law will permit; and a late act of parliament, often called the Interpleader Act, in some degree acts as a relief to the sheriff; but that has nothing to do with his general liability.

But then the defendant says, that, by the constructions which have been put upon the general administration of the bankrupt law, public officers, who have to execute process, are protected in cases like the present; and that, though for a number of years back there are cases, and the practice, while these cases have been in force, has been against sheriffs, yet these cases and practice are not according to law, and that the earlier cases are contrary, and that they being the first that occurred after the bankrupt law was introduced, are to be regarded as the real existing law, not to be overturned by late decisions, and more particularly, as the defendant says that the whole of these modern cases and modern practice has been founded on misapprehension of the case of *Cooper* v. *Chitty*(*a*), and that in all the latter cases the former decisions have not been sufficiently brought before the court. The earliest case urged on the behalf of the defendant is *Bayly* v. *Bunning* (*b*), where the judges say, the sheriff's taking was lawful by virtue of the writ. But in *Siderfin* the reporter makes a query. For it is affirmed that the practice is, that the sheriff shall be found guilty, if the party was then a bankrupt. The special verdict has been examined in *Bayly* v. *Bunning*, and it appears that the sheriff had caused to be

(*a*) 1 Burr. 20; 1 Blac. 65; 1 Ken. 395.

(*b*) 1 Lev. 173; 1 Sid. 271.

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made the money of the goods, chattels and monies of the bankrupt, but that they remained in his hands, and he had not sold or delivered them to the judgment creditor. And then it states a demand and refusal, and concludes with saying, that they are ignorant whether the *taking* was lawful. This special verdict is quite imperfect; there is no conversion found, and the question by the jury is, whether the taking was lawful, and therefore is such an imperfect case; and the very slight way in which it is mentioned in the two reports, makes the case amount to very little, especially as one reporter states the practice to be contrary. And that may account for the language of the judges that the *taking* was lawful, and which may have been meant to apply to the original taking only, and not to say any thing whether, if the goods had been sold, the sheriff would be liable. This case, however, as far as it goes, is confirmed by what the court says in *Philips* v. *Thompson* (*a*). *Turner* v. *Felgate* was mentioned in *Bayly* v. *Bunning*; it is reported in 1 *Levins.* 65, 2 *Sidersfin*, 125, and has been considered as applicable to the present case. That was an action of trespass against the creditor, who had obtained judgment and levied under a *fieri facias*, and the judgment was afterwards set aside by rule of court; and it was there said the sheriff was not liable, because he acted in obedience to the king's writ; and that there is a difference between the party and the sheriff in that respect. There is not the least doubt about that. The sheriff is protected by the writ, and he need only plead that by way of justification to an action of trespass. But the party must plead the judgment. The sheriff is bound to obey the writ, but the party must show that he had authority to sue out the writ, and that authority is the judgment. If the party was not bound to show the judgment, it would be in the power of any man, who had obtained no judgment, to sue out any sort of writ of execution, for any amount that he thought proper. But that does not apply to the present case; here the writ directs the sheriff to take the goods of *A.*, and if he does take the goods of *A.*, it is immaterial to him whether there

(*a*) 3 Lev. 191.

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was any judgment against *A.* or not. But the complaint is, that he does not obey the king's writ, and that being directed to take the goods of *A.*, he takes goods which, though in the possession of *A.*, yet by operation of the bankrupt law they ultimately turn out, in point of law, not to be the goods of *A.* The case of *Lechmere* v. *Thorogood*(*a*) is also cited in favour of the defendant. That was an action of trespass against the sheriff. One of the points in dispute was, whether the crown, under an extent, or the party under a *fieri facias*, was entitled to the goods. But the court said the sheriffs were not liable in this action, and there is no doubt but that according to the modern cases he is not liable in trespass; for in *Smith* v. *Mills*(*b*), it was held that an action of trespass will not lie against the sheriff, who seizes goods after an act of bankruptcy and before issuing a commission, though he afterwards sells them. But at the same time I must observe, that in the report of *Lechmere* v. *Thorogood*, in 3 *Modern*, there is nothing said about the liability of the sheriff. Afterward an action of trover was brought against *Toplady*, the party, and *Thorogood* and another, for taking the goods, and it is reported in 1 *Shower*, 146, and 2 *Ventris*, 169, they pleaded the judgment in the former action, and it was held to be a bar. But that was decided only on the technical ground of law, that after a judgment for the defendants in trespass, the plaintiff could not recover in an action of trover for a conversion of the same goods; but there is not a syllable said in the latter case as to the liability of the sheriff, and I think no argument can be applied from any reasoning upon technicalities and the form of action, as to whether the sheriff is liable for seizing and selling goods under circumstances like the present. *Coles* v. *Davis*(*c*) is also cited for the defendant. Lord Chief Justice *Holt* there held, that the sheriff was not liable to an action of trover under circumstances like the present. That case, as far as it goes, is in point for the defendant: but it is only a nisi prius decision.

As to the other cases of *Bayly* v. *Bunning*, and *Lechmere*

(*a*) 3 Modern, 326; 1 Shower, 12; Comb. 123.
(*b*) 1 Term Rep. 475. (*c*) 1 Ld. Raym. 724.

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v. *Thorogood*, considering the imperfect manner in which they are reported, and considering also the special verdict in *Bayly* v. *Bunning*, I think they only amount to a declaration of the opinions of the judges there, that, generally speaking, the sheriff was not liable, but by no means to a judgment upon a case like the present, distinctly brought and argued before them, and that therefore the courts in later times are not so far bound by those cases, but that they may take another view of the case, without being considered as unwarrantably overturning former decisions. The case of *Cooper* v. *Chitty* is the leading case on the subject in more modern times. I admit that the facts of that case are not the same as here, for there the sale was after notice of the act of bankruptcy and *after the commission and assignment*, and that decision would not of itself be sufficient to authorize the Court to give judgment for the plaintiff: but that case has been followed by a variety of others, in some of which at least the facts were the same as the present. I do not at all think it necessary to go through these cases and comment upon them and upon the language used by particular judges, as that has been so fully done already. The result of these cases fully satisfies my mind, that in the present case the bailiff is liable; and I may say in addition that I have known a great many cases tried at nisi prius, in which the point has never been doubted. And I would also add in conclusion, that if the cases of *Bayly* v. *Bunning*, and *Lechmere* v. *Thorogood*, had been fully brought before the court, upon a case like the present, and the judgment had been given according to the opinion there expressed by the judges, yet if I had found that for a series of years there had been so many decisions and constant practice the other way, then inasmuch as the latter authorities are according to what would be my opinion if the question was now for the first time to come under consideration, I should say the court ought to act upon the later authorities, though by that means the former decisions should be overturned.

I have not given my opinion as to the respective indemnities to *Jewison* and to *Ingham*, as I am of opinion that

they are both liable to this action, independent of any question of indemnity. Upon the whole of the case I am of opinion that the judgment of the Court of Exchequer ought to be reversed.

Mr. Justice PARK.—This case has been so fully discussed by my learned brothers who have preceded me, that I am much tempted merely to express my concurrence with the majority. The only reason why I prefer the contrary course is, that I may not be supposed to have taken no pains to instruct myself in a matter where the Court of Exchequer has delivered an unanimous judgment, supported as that judgment is, by my learned brother who sits next me; and which judgment the majority of the judges now present think ought to be reversed. The real point in this case is, Whether a sheriff, or bailiff of a liberty, who seizes the goods of a party under a writ of *fi. fa.*, (a secret act of bankruptcy having been previously committed, and of which the sheriff had no notice,) is liable in an action of *trover* to the assignees of such party under a commission of bankruptcy subsequently issued, founded upon the said previous act of bankruptcy? I am of opinion that he is. It may certainly be hard on a sheriff or bailiff, that he should be held liable in a case like the present, where no misconduct can be imputed to him or to his officers. But it appears to me, that if, on account of such hardship, we were to affirm this judgment of the Court of Exchequer, we should break in upon an *established* rule of law, established confessedly for above seventy years, admitted as a clear rule in all the text books of writers upon bankrupt law; acted upon by all practisers in their advice to clients, and confirmed by some of the ablest men that have ever adorned the judicial seat, from Lord *Mansfield* down to the present day, viz. from the year 1756. The question really is, whether these goods, when the bailiff seized them, *were the goods of the bankrupt* or *the goods of the assignees*, by relation to the act of bankruptcy. That the act of bankruptcy vests the goods in the assignees seems not to be disputed; then certainly the process having *commanded* that the goods of *A.* should be taken,

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the sheriff must at his peril answer if he take goods which have become the property of *B.* by being sued in an action of *trover*. Mistake as to the *right* of property, *at the time of the seizure*, both in the plaintiff herself, as to her rights, and in the sheriff, as was truly stated by my brother *Bayley*, in the case I am about to quote, will not excuse the sheriff. And indeed that *was* a very hard case—I mean the case of *Glasspoole* v. *Young* (*a*), where a writ of execution issued against a man named *Meering*, the *supposed* husband of the plaintiff, who really *believed* herself to be his *lawful wife* at the time of the seizure of the goods, which *had been her property*; but after this, the woman discovering that a *former wife was living*, and *the marriage with her consequently void*, recovered the value of the goods against the sheriff in an action of *trover*, by the unanimous judgment of Lord *Tenterden* and my brothers *Bayley*, *Littledale*, and *James Parke*. The rule of law then is undoubted, that the sheriff must at his peril seize the goods of the party against whom the writ issues; and if they have ceased without fraud to be the goods of that party, the sheriff is liable if he seized them, though not cognizant of the change of property. The hardship then can be no argument if the law be clear, for there are many other cases in which the law has thrown a similar liability on the sheriff, not regarding the hardship. And I am not aware of any exception in any bankrupt acts in favour of the sheriff. For, as Lord *Ellenborough* said in the case of *Stephens* v. *Elwall* (*b*), the Court must be governed by the principles of law, and not by the hardship of any particular case. For what can be more hard than the common case of trespass where a servant has done some act in assertion of his master's right—that he shall be liable, not only jointly with his master, but if his master cannot satisfy it, for every penny of the whole damage, and that his person also shall be liable for it. But the sheriff is in a much better situation, for though he must often act at his peril and sustain losses, yet he has considerable fees in poundage &c. to remunerate him. It is admitted—indeed it was impossible to deny, that the point has been expressly decided over

(*a*) 9 B. & C. 697. (*b*) 4 M. & S. 259.

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and over again. But it is desired that all those cases should be overturned, because they all, it is said, depend upon the case of *Cooper* v. *Chitty* (*a*), and none of the latter cases refer to the cases before *Cooper* v. *Chitty*, and which are at variance with that decision; for those who wish to overturn it allege that if the Courts had looked at those prior decisions, they never would have upheld Lord *Mansfield*'s doctrine and that of his brethren. This seems to me to be a most disingenuous argument, and not very complimentary to the judges, who, numerous and powerful in knowledge and talent as many of them have been, have decided those latter cases. It is true that in the arguments of some of them, the older cases of *Bayly* v. *Bunning*, *Lechmere* v. *Thorogood*, and others, have not been mentioned, but are we thence to infer that the learned judges were unacquainted with, or did not weigh those decisions? The fact is directly otherwise, and the only fair inference is the reverse. The later judges, it is said, have followed *Cooper* v. *Chitty*. Be it so; then they must have read it; and could not have done so without seeing the cases I have alluded to reasoned and commented upon both at the bar and on the bench. The fair and legitimate inference therefore is, that the judges were of opinion that if *Cooper* v. *Chitty* did overturn the former decisions, it was more consonant to reason, public convenience, and sound policy to hold the sheriff liable, even in case of mistake and ignorance, than it is to suppose that the judges shut their eyes and remained wilfully ignorant of the prior cases. Besides it is a mistake in the judgment of the Court of Exchequer when they allege that none of the later cases than *Cooper* v. *Chitty* refer to *Bayly* v. *Bunning*; the contrary is the fact. I have considered the cases alluded to; and though I do not highly approve of very long and elaborate judgments, yet I must say, that in all the reports of the different stages of the case of *Lechmere* v. *Thorogood* and *Lechmere* v. *Toplady*, it is most difficult to get at the real history of that case; but taking them all together one thing seems clear, that the

(*a*) 1 Burr. 20, 1 Bla. 65, and 1 Kenyon, 395.

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sheriff was held not to be a *trespasser*, in such a case as this; nor has any judge in *Cooper* v. *Chitty*, or in any case since, so considered him. It was also held, in *Lockmere* v. *Toplady*, where *trover* was afterwards brought, that it would not *then* lie; not that it would not lie, generally speaking, but the plea of a judgment in the act of trespass against the sheriff, was a good bar by way of estoppel; whether the court were right or wrong in this latter opinion, I do not stop to inquire: if wrong, it weakens the authority of the case altogether: if right, it does not militate against the position that *trover* generally will, though *trespass* will not lie against the sheriff. *Comberback*, in p. 123, makes Lord C. J. *Holt* say, that the property of the goods is vested by the delivery of the writ of *fi. fa.* even against the king's extent. This, as Lord *Mansfield* truly observes, could not have been said by Lord *Holt*, for no *inception* of an execution can bar the crown. Lord *Holt* himself, in another case, says the direct contrary to what *Comberback* here reports of him; for in *Smallcomb* v. *Cross* (*a*) his lordship says, "the property of the goods is not absolutely bound by the delivery of the writ to the sheriff;" and this question is now happily set to rest by the decision of the House of Lords last session, in *Giles* v. *Grover*. Besides it is difficult to understand when and by whom this case was decided. 3 Mod. dates its decision in *Trinity*, 4 *Jac.* 2; at which time Sir *John Holt* was not chief justice, for it is clear matter of history that he was appointed upon the revolution in the room of Sir *Robert Wright*, who continued to be chief justice during all the *Michaelmas* term following the landing of King *William*, and no *Hilary* term was kept in consequence of the Revolution. *Comberbach* makes the decision take place in *Trinity*, 1st of King *William*, twelve months after the date of the former; and *Shower* states the decision to have taken place in *Easter*, 1st King *William*. The case of *Lockmere* v. *Toplady* was in the Common Pleas, *Hilary*, 2 *William and Mary*. The only object in making these observations is to show the extreme inaccuracy and inattention of those persons who, by this inaccuracy in dates, may be presumed to have taken

(*a*) 1 Ld. Raym. 251.

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their accounts of what passed from others, but not to have been themselves present; for even the publisher of 3 *Mod.* says in his preface, that he must confess that some of the late reports (of course not meaning his own) are collected with very little judgment. *Bayly* v. *Bunning* (*a*) which is mentioned in *Phillips* v. *Thompson* (*b*), was undoubtedly an action of *trover*; but for the reasons so ably given by my learned brother *Bosanquet*, and which I therefore shall not repeat, it is clear that even giving full credit to that decision, it does not at all govern this case. But even if it were more applicable to it, I cannot feel all that respect for such unsatisfactory accounts of that decision, so at least as to induce me to agree to overturn the uniform and consistent train of judgments of seventy-six years and more, by some of the ablest judges that *Westminster Hall* has seen. The oldest man now living remembers no other rule upon this point than *Cooper* v. *Chitty*, which it is supposed is established; and admitting for argument only that that was a novel decision, yet no inconvenience has resulted from it. Judges have been followers of that rule, counsel and attornies have advised suitors upon its strength, and merchants have, as assignees, known and abided by it; and it is, as we well know, frequently immaterial how points of law are determined, provided they are known and uniform. And certainly this point of law has been known and uniform for the long period abovementioned.

Who were the judges that decided *Cooper* v. *Chitty*? Lord *Mansfield*, who is not, I believe, remembered by any one now present, myself excepted, was a judge who, in the expressive language of one who knew him well, and who could duly appreciate his learning and ability, so enlarged and commented upon cases, and was so powerful in argument, that his hearers were sometimes lost in admiration at the strength and extent of the human understanding. His colleagues, when *Cooper* v. *Chitty* was decided, were no other than Sir *John Eardley Wilmot* (afterwards Chief Justice of

(*a*) 1 Lev. 171. (*b*) 3 Lev. 191.

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the Common Pleas), the very learned Mr. Justice *Foster*, and Mr. Justice *Denison*. Was it a hurried decision? It was argued in two different terms by four of the most eminent advocates of that day, after which the court took time to deliberate, and then Lord *Mansfield* delivered a clear, lucid, and argumentative judgment of himself and his three most learned brethren, and commented upon the cases of *Bayly* v. *Bunning* and *Lechmere* v. *Thorogood* in a way which shows, at least, that they had by no means been overlooked by them. The case of *Cooper* v. *Chitty* is best reported in the first volume of Lord *Kenyon*'s Cases, p. 395; although there is no material difference between *Kenyon*, *Blackstone*, and *Burrow*; and whoever reads with attention Lord *Kenyon*'s note, though his lordship was then a very young man, will discover all the accuracy and acuteness of that great mind, so well remembered by us who saw him, as many of us saw him, in the full splendour of it; and when reading this luminous judgment of Lord *Mansfield*, as reported by his eminent successor, I cannot but lament that in the course of some of the arguments in the cases *now* under consideration, Lord *Mansfield* should be charged with making "a very useless display of what would appear to be legal knowledge, and filling up six pages with what might have been expressed in eight lines." I am sorry to say the judgment of modern days cannot claim a superiority in conciseness and beauty above those of Lord *Mansfield*. Were I, after the discussion this case has undergone at the bar, and after the luminous judgments of my brothers who have preceded me, to travel through and to comment upon all the cases since *Cooper* v. *Chitty* which have been uniform, I *should* indeed be justly chargeable with making a useless display of legal knowledge; I shall merely mention them and the host of learned persons who have affirmed the doctrine. *Smith* v. *Mills* (*a*) was an action of *trespass*, and after time taken to consider, *Ashurst* and *Buller* justices, held, it would not; but expresly took the distinction between *trover* and *trespass*; and a long passage of my Lord *Mansfield*'s judgment in *Cooper* v.

(*a*) 1 T. R. 475.

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*Chitty* is read by Mr. Justice *Ashurst* and adopted by the court. Mr. Justice *Ashurst* was not an eloquent man, but he was always reckoned a learned judge; and of the high legal character of Mr. Justice *Buller*, all the profession formed a very just estimate. In *Potter* v. *Starkie*(*a*), Mr. Baron *Wood* first, and the whole Court of Exchequer afterwards held, that the sheriff was liable in *trover*, though *he seized, sold and actually paid over the money* before a commission issued and before any *notice*, saying that this necessarily followed from *Cooper* v. *Chitty*, for it was an unlawful interference with another's goods. In *Stephens* v. *Elwall*(*b*) it was held, that a servant may be charged in *trover*, though the act of conversion be done for the benefit of the master. And Lord *Ellenborough* observed, that the court must be governed by the principles of law, and not by the hardship of any particular case. In *Wyatt* v. *Blades*(*c*), it is supposed, in the judgment we are now considering, not to show sufficiently what the opinion of Lord *Ellenborough* was, nor whether the point now under consideration was then raised. The facts of that case were similar to those now before us; and it seems to me impossible that Lord *Ellenborough* (though the counsel might not have stated the case with much precision) could have decided as he did, if he had not had the supposed point of *Cooper* v. *Chitty* in his view. The case of *Lazarus* v. *Waithman* (*d*) was decided by the Court of Common Pleas, during the chief justiceship of Sir *Robert Dallas*, in the same way as *Cooper* v. *Chitty* was. I speak not of any opinion of mine in that case, but I can speak of two of the court, happily still alive, though no longer of our body—two better lawyers could not be found—I mean my brothers *Burrough* and *Richardson*—the former states the point to have been settled long before he knew *Westminster Hall*. The latter (and no man had more practical experience) says, that the law as to a question of this nature had been long since settled, and had frequently occurred of late years at nisi prius. There must have been an accidental

(*a*) 4 M. & S. 260.
(*b*) 4 M. & S. 259.
(*c*) 3 Camp. 396.
(*d*) 5 B. Moore, 314.

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misstatement in the judgment below, when it is supposed that *Lazarus* v. *Waithman* was decided altogether upon *Cooper* v. *Chitty*, and that none of the earlier cases were mentioned. Those acquainted with the infinite pains which Lord Chief Justice *Dallas* took to inform himself by diligent research, and to procure information from others, of every case and decision that at all bore upon matters before him, will not readily believe he was not aware of the cases of *Bayly* v. *Bunning*, and *Phillips* v. *Thompson*. But it happens that even if the Lord Chief Justice of that day were not entitled to all the commendation I most cheerfully and affectionately bestow upon him, the very case supposed to have been overlooked by the Judges *Dallas*, *Burrough*, *Richardson*, and myself, were expressly quoted and relied on by the learned counsel for the sheriff in *Lazarus* v. *Waithman*. In *Price* v. *Helyar* (*a*), we have to add the weight and authority of that very eminent and acute judge, Lord Chief Justice *Best*, who delivered a most luminous judgment, after time taken to consider, as the joint opinion of his lordship, myself, and Mr. Justice *Burrough*, the facts of the case being not possibly distinguishable from this. Nor does the weight of authority and name rest here; for in *Carlisle* v. *Garland* (*b*), Lord Chief Justice *Tindal*, my brothers *Bosanquet* and *Alderson*, all mentioned the same point: and again, that eminent judge, Lord *Tenterden*, with the concurrence of my brothers *Littledale*, *Taunton*, and *Patteson*, in *Dillon* v. *Langley* (*c*), expressly resembling this case in every respect, says, "The sheriff must obey the writ, but he is also required to know *whose goods he takes*. We ought to consider ourselves bound by the many decisions which have taken place establishing the liability of the sheriff;" and then his lordship refers to the case of *Carlisle* v. *Garland* as in point. Indeed it is admitted in the court below that the cases of *Potter* v. *Starkie*, *Lazarus* v. *Waithman*, *Price* v. *Helyar*, *Carlisle* v. *Garland*, and *Dillon* v. *Langdale*, cannot be distinguished, either in facts or reasoning, from the case

(*a*) 4 Bing. 597. (*b*) 7 Bing. 298. (*c*) 2 B. & Adolphus, 131.

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now under consideration. I have before referred to the case of *Glasspool* v. *Young*, as a much harder case against the sheriff than the present, and without restating it. I may mention it for the sake of adding to the list of legal luminaries, who, for the last seventy-six years, have uniformly concurred in this opinion till now, the names of two eminent judges, Mr. Justice now Mr. Baron *Bayley*, and Mr. Justice *James Parke*. If, therefore, I even thought the case of *Cooper* v. *Chitty* wrongly decided, as some of my brethren seem to think, I do not feel myself strong enough, nor do I think myself justified in setting up my judgment against the host of great men who have so long considered this as a closed and settled point. I may add, without impropriety, that Lord *Tenterden*, in a conference of all the judges who had heard this case argued, concurred in the opinion I have formed; and when the opinion of one so pre-eminent as a judge, and so humble and unassuming as a man, is mentioned, it will claim and receive from every other judge and lawyer the most profound and unfeigned attention and respect, especially when in a case having no connection with this, he is found to declare that the judgments of former times (and I speak of the uniform judgments of above seventy years) ought to be followed and adopted, unless we can see very clearly that they are erroneous; otherwise there will be no certainty in the administration of the law.

When, therefore, I find this law *uniformly* acted upon for much above seventy years, I rejoice, after a long judicial life, to declare my firm belief that a new practice on this point should not be introduced. I think it cannot be done without danger, and that therefore the judgment of the Exchequer ought to be reversed.

The Chief Justice TINDAL.—It has become unnecessary for me, after the full discussion which this case has undergone, to state at length the grounds upon which my judgment has been formed, or to comment upon the several cases which have been already brought before the notice of the court. I

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shall endeavour to compress within as short a compass as is consistent with making myself intelligible, the reasons upon which my mind has been brought to the conclusion, that the judgment of the court below ought to be reversed. The question arising upon this special verdict is in substance this: whether the sheriff, who has seized the goods of a defendant, under a writ of *fi. fa.*, and has sold and delivered them to the judgment creditor, in satisfaction of the debt, after a secret act of bankruptcy committed by the defendant, but before the issuing of a commission against him, is liable to an action of trover at the suit of assignees subsequently chosen under such commission? And upon this question I can arrive at no other conclusion, upon the construction of the statute upon which the bankrupt law now stands, without any reference to the cases decided on the point, than that the seizing and subsequent sale of these goods to the judgment creditor is a wrongful conversion, so as to make the sheriff liable in an action of trover. This answer to the question above put, rests upon two distinct propositions; first, that the goods in question were, at the time of the sale under the writ, the property of the assignees, having become their property by relation from the time of the act of bankruptcy. Secondly, there is no exception, either express or implied, in the bankrupt act, in favour of a sheriff executing the king's writ. I shall proceed to consider each of these positions separately and in order. First, upon the just construction of the late statute, the goods at the time of the sale belonged to the assignees, and the sale was a wrongful conversion, because it was a sale of their goods. That the ownership of the goods was not divested out of the bankrupt by the act of bankruptcy, or by the issuing of the commission, or by any other act than the execution of the commissioner's assignment, may indeed be readily admitted. If any authority were necessary for that point, the cases of *Cary* v. *Crisp* (*a*), and *Brassey* v. *Dawson* (*b*), are decisive

(*a*) Salk. 108. (*b*) 2 Str. 978.

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upon the subject. But it seems equally clear, that by the necessary construction of the clause, by which the commissioners are directed to "assign all the bankrupt's money, goods, chattels, and debts, wheresoever they may be found or known," such assignment, whenever made, shall operate by relation, so as to carry to the assignees all the property which the bankrupt had at the time of the act of bankruptcy. The 12th section of the recent act 6 *Geo.* 4, upon which the law now stands, varies indeed in some particulars of expression from the language of the earlier acts, but not so materially as to afford a general ground for any difference of construction in this particular, in which it is certain no real difference could have been intended. It has, indeed, been observed in *one* case by Lord *Hardwicke*, then C. J. of K. B. (in *Brassey* v. *Dawson*) (*a*), that this relation is a fiction of the law, and that fictions are not to be favoured. But I must confess myself unable to consider it as any fiction at all, for it appears to be the direct positive language of the legislature, expressed in plain and unequivocal terms. That such an enactment is, indeed, attended, in some cases, with hardship, must be admitted; but there seemed to have been no alternative for the legislature, but either to allow these individual cases of hardship, or to submit to a general inconvenience; for unless the assignees were made to take the property of the bankrupt as it stood at the time of the bankruptcy, this general inconvenience must follow, that the estate would be subject to all the fraudulent or improvident dispositions and conveyances which failing men, in a state of bankruptcy, will inevitably have recourse to. That such relation was intended, is evident from the consideration, that in various instances where the individual hardship was greater than was warranted by the general convenience, the legislature has from time to time, by new statutes, cut down the relation in particular cases; as, first, in the case of payment of debts *to* the bankrupt before notice of an act of bankruptcy, (1 *Jac.* 1. c. 15); next, in the

(*a*) 2 Str. 978.

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case of the sale of real property by the bankrupt, where the commission is not sued out within five years after the secret act of bankruptcy, (21 *Jac.* 1. c. 19); again, in the case of payments by the bankrupt to creditors for goods sold, (19 *Geo.* 2. c. 32); and lastly, in the case of conveyances, contracts, and other dealings and transactions with bankrupts *bonâ fide* made and entered into more than two calendar months before the date and issuing of the commission, (46 *G.* 3. c. 135).

All which provisions of the legislature do prove and establish two points; first, that such relation to the act of bankruptcy did at the time exist under the previous enactment; and secondly, that nothing short of the authority of parliament itself was sufficient to relax the severity of the former law. The courts of law have uniformly held such construction of the bankrupt acts: I will refer to one case only, namely, the judgment of Lord *Hardwicke*, when Chancellor, in *Billon* v. *Hyde* (a), because it appears to me to import, that at that time he did not consider this relation to the act of bankruptcy to be a fiction of law. Lord *Hardwicke* observes, "It is said that this rule [the relation to the act of bankruptcy] founded on this act of parliament is contrary to the general reason of the law, which says that fictions of law and legal relations shall not enure to the wrong of any one; which is a general rule invented to support the right and equity of the case. But the reason of taking this case out of that rule is plainly this, and the law did intend it on this general rule, that it is better to suffer a particular mischief than an inconvenience; and the legislature foresaw that there would be a particular mischief which they cured by that proviso, but did not extend it further, because the inconvenience, on the other hand, of suffering bankrupts to dispose of their effects by contracts or judgments, would put it in their power to defeat their just creditors of their debts, so that it would be difficult, commonly, to find out whether there was a mixture of fraud, so

(a) 1 Ves. 326.

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the legislature thought it better to lay down that general rule." Upon these grounds it may, I think, be safely concluded, that all the property belonging to the bankrupt, at the time of his bankruptcy, passes to his assignees by the commissioners' assignment, whatever may be the time at which such assignment is executed. The second ground above referred to is, that there is no particular exception, express or implied, in the bankrupt act in favour of the sheriff executing a writ after a secret act of bankruptcy; so that whilst servants of the bankrupt, judgment creditors who set the law in motion, vendees at the sheriff's sale, and all other persons who assist in selling, disposing, or removing the goods of a bankrupt after a secret act of bankruptcy, would confessedly be held guilty of a wrongful conversion, so neither is the sheriff, by reason of his situation and character, exempted from the same liability. That there is no *express* exception is evident from perusing the words of the statute; if there be any exception, therefore, it must be one that is implied. Now the only ground upon which such implied exception in favour of the sheriff is contended for, resolves itself at last into the hardship of his case; it is said to be a hard measure to make him answerable where he is obliged to execute the writ, where he is acting honestly in the execution of his duty, and is under an invincible ignorance at the time that the goods are the property of the assignees.

The question therefore is, whether such hardship upon the sheriff can be held upon any legal grounds to work an exception in his favour. If once this principle were to be admitted, it would operate not only in cases where the ignorance of the sheriff was really invincible, but in many others, where a small exercise of caution, inquiry, and investigation would have been sufficient to have prevented him from executing the writ: such an exception therefore, in order to prevent a mischief to the individual in a few cases, would occasion an inconvenience to the creditors at large in many.

Again, in how many other cases does the law hold him responsible, where he is equally honest in the performance of

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his duty, and his difficulty in choosing the right cause is equally great? In an execution against *A.* if he sells the goods of *B.* which are in *A's.* possession and apparent ownership, by loan or otherwise, he is liable in trover to the rightful owner, even after he has paid over the money. If bail are tendered to him, which appear sufficient at the time, he is bound to accept them, and to discharge the defendant from his custody. Yet if they fail before bail above is put in, the sheriff may become answerable in damages to the plaintiff, and not improbably for the amount of the debt. He is answerable generally, *civiliter*, for all acts of his bailiffs, for voluntary escapes permitted by them, and for extortion. If the hardship is urged in those cases, the answer is, that the officers give security to the sheriff; but it is obvious that if their securities fall short, he is answerable to the party in his purse or in his person. I would refer to the late case of *Glanystole* v. *Young* and others (*a*), already stated by my brothers *Park* and *Taunton*, where the sheriff was held liable for the execution of his duty, under circumstances of ignorance equally invincible as the present.

By analogy, therefore, to the law by which the sheriff's responsibility is governed in many other cases, the mere circumstance of *hardship* ought not to form any ground of exemption from his liability in this particular case. After all, the office of sheriff is an office not only of risk, but one of profit also. So says Lord *Mansfield* expressly in the case of *Cooper* v. *Chitty*, so often referred to, an office of which men are ready to take the risk upon themselves for the sake of the profit, in the character of under-sheriffs, bailiffs, and other officers; giving the sheriff a sufficient indemnity, to secure him against any damage or loss from acts done by them in his name. But the strongest argument against implying an exception in favour of the sheriff, appears to my mind to be the course pursued by the legislature itself above adverted to; who have by new and distinct statutes from time to time created new exceptions from the retrospective

(*a*) 9 B. & C. 696.

operation of the assignment, whenever the hardship to individuals was deemed sufficient to call for it. And the legislature has so done in many cases, but not interfered in the present; why then is such exception to be ingrafted upon the statute by us, whose duty it is to declare the law, and not to make it? Upon these grounds it appears to me, that no exception of any kind exists in the bankrupt act in favour of the sheriff, however honestly or innocently he may have acted in the execution of the writ directed to him, if he does in fact take under it, not the goods of the defendant to the suit, but those of the assignees. And this appears to me to dispose of the whole point in controversy, for if the sheriff appears to be liable to the action upon the construction of the statute itself, without reference to any of the cases on the point, I think it must at once be admitted there is no such weight of authority in favour of the sheriff from the decided cases as to call for any contrary decision. Indeed the weight of authority to be derived from the cases subsequent to that of *Cooper* v. *Chitty*, seems to be admitted, in the argument of this case in the Court of Exchequer, to be against the sheriff; but it is contended that all the latter cases proceeded partly upon a misconception of the case of *Cooper* v. *Chitty*, and partly on the ground that the earlier cases of *Bayly* v. *Banning* and some others, had not been brought to the attention of the courts of law when deciding such latter cases. I shall satisfy myself, therefore, with making a few observations upon the cases of *Cooper* v. *Chitty* and *Bayly* v. *Banning*, as the learned judges who have preceded me in argument have entered into a more laboured detail of the modern cases; and I would only observe, that they form a connected chain of decisions against the sheriff, some in each court of common law at *Westminster Hall*, for the last sixty years. Now with respect to the case of *Cooper* v. *Chitty*, it may be admitted at once, that it forms no authority for the present case. The seizure by the sheriff was, indeed, after a secret act of bankruptcy, but the sale did not take place until after the assignment, and at a

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time when both commission and assignment were known to the sheriff. There could therefore be no doubt but that such a sale, with such notice, was a wrongful conversion by the sheriff. Although, however, the facts of that case do not agree with the present, the judgment of Lord *Mansfield* lays down and adopts a broad distinction between the liability of the sheriff in an action of trespass, and his liability under the same state of circumstances in an action of trover; holding that the former action was not maintainable, but that the latter was. And it seems a sensible and rational distinction, that the sheriff having acted innocently in the taking, should not be liable in that form of action in which the jury may give damages for the taking distinct from the value of the goods, but that he should nevertheless be subject to that action in which the proper measure of damages is the actual loss which the plaintiff has sustained by the sale. And the case of *Bayly* v. *Benning*, when rightly understood, affords no authority in favour of the sheriff where he has *sold* the goods. Upon looking at the record in that case, it appears that it was an action against *Mawley* the judgment creditor, and *Benynge* the bailiff of a hundred within the county of *Northampton*. The bailiff seized the goods after a secret act of bankruptcy, but he never sold the goods at all. For the jury expressly find, "that the money, goods, and chattels still remain in the hands of *Benning*, neither sold nor delivered to *Mawley*." And upon this finding the jury declare their doubt to be, whether the goods were *taken or not* by pretext of the writ of *fi. fa.*? Certainly a very inartificial finding, and the court, after argument and time taken to consider, held, that the *original taking was lawful*.

The reporters do, indeed, put the decision upon the ground of the official character of the sheriff, because the taking by him was lawful by virtue of the writ. But if the bailiff in that case, as in the present, had not only *seized* the goods, but had *sold* them, or delivered them over to the judgment creditor, there is nothing in the case of *Bayly* v.

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*Bunting* to show that he would not have been held guilty of a wrongful conversion. I look upon the case of *Bayly* v. *Bunning*, therefore, to be a single case, standing upon very peculiar circumstances and decided upon very narrow grounds; and that in effect it says no more than that if the sheriff makes a seizure in obedience to a writ, which seizure is lawful at the time, then, if he neither sells the goods nor delivers them over to the judgment creditor, but keeps them in his own hands as a stakeholder between the assignees and the judgment creditor, the original act of taking shall not be held unlawful so as to sustain an action of trover. To that extent it shows the bailiff was favoured in his official character, but no further. But why, under the circumstances stated in that special verdict, a subsequent demand by the assignees, and a refusal to deliver up the goods to him, should not have been held a conversion if the special verdict had been properly framed, I confess myself wholly unable to discover.

But although the judgment of Lord *Mansfield* in the case of *Cooper* v. *Chitty*, propounds a distinction between the responsibility of the sheriff in the form of trespass and in the form of trover, not called for by the circumstances of that case, no one can deny that such distinction has been adopted in numerous decisions in the courts of *Westminster Hall* from that time to the present. It has been inserted in text writers on the law of bankrupt, as a distinction established by undoubted authority. It is laid down in digests of the law as an acknowledged principle. It has been acted upon by the practitioners in *Westminster Hall* of the present day during the whole of their lives, without the slightest suspicion or doubt of its soundness. Judicial decisions in courts of justice are ranked by Lord *Hale* as one of the grounds or constituents of the common law (*a*). And if a series of judicial decisions are shown, some in each court in *Westminster Hall* from the time of *Cooper* v. *Chitty* down to the present period, in which the sheriff has been held liable to trover for seizing and selling after an act of bankruptcy, but

(*a*) Hale's History of the Common Law, c. 4.

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before a commission; if neither the case of *Cooper* v. *Chitty* nor the cases which preceded it, do, when rightly understood, contravene that principle, surely the question should be considered as at rest, even if the principle on which it was originally established were involved in doubt.

I cannot conclude without adding a much greater weight to the opinion which I have formed, than that which might otherwise belong to it, by stating, that upon the discussion of this case amongst the judges after the argument, the late eminently learned and accurate Lord Chief Justice of the King's Bench, declared it to be his opinion, that from the numerous decisions in the courts of *Westminster Hall* the law was settled against the sheriff, so that it was no longer a subject for argument; and that even if the question were *res integra*, he should come to the same conclusion.

For the reasons, therefore, which I have stated above, I think the present judgment should be reversed.

Judgment Reversed.

Mr. Justice ALDERSON was also present, but having been concerned in the cause while at the bar, gave no opinion.

*IN THE EXCHEQUER OF PLEAS.*

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**Ex parte JONES and Another, in the matter of RICHARDSON a Bankrupt.**

By the register act, 6 *Geo.* 4. c. 110. sect. 39. the officers of customs are directed not to register bills of sale of ships which at the time they are mortgaged are absent from port, till thirty days have elapsed from their arrival in port. Two ships and 16-64th parts or shares of a third were mortgaged while at sea by bill of sale to *W.* & Co., which bill of sale was registered by the officers of customs of the port to which they belonged before their return to port. One ship ~~afterwards returned~~, but no indorsement of the bill of sale was made on her certificate of registry. After being insured, she sailed again within thirty days on another voyage, in which she was lost. By a bill of sale of a subsequent date (to which *W.* & Co. were parties), after reciting the prior mortgage to them, the same mortgagor assigned to *J.* & Co. the same ships and shares, with the policies effected on two of them, and the sum payable by certain charterers for the hire of the third, with all his equity of redemption in the said ships, freight, monies, and premises, subject to the prior mortgage to *W.* & Co. and to their power of sale. This bill of sale was also registered before the return of any of the ships to port. The mortgagor became bankrupt. Two of the ships returned, and their certificates of registry were duly indorsed within thirty days, with the two bills of sale in the order of their dates.

Held, that the second bill of sale was valid under 6 *Geo.* 4. c. 110. ss. 31 & 37. against the assignees of the bankrupt, as to the interests in the ships which it purported to assign to mortgagees; notwithstanding the mortgagor's bankruptcy occurred before the lapse of thirty days after the ship arrived in port.

So also as to the policies of insurance, and monies due on the charter-party.

THE Lord Chancellor, upon hearing a petition of *E. A. Jones* and *H. M. Jones*, in the matter of *William Richardson* a bankrupt, directed a case to be made for the opinion of the court of Exchequer as follows.

*William Richardson* the bankrupt was, at and before the date and execution of the several bills of sale hereinafter-mentioned, sole owner of a vessel called the *Lady East*, and of a vessel called the *Sprightly*, and was also the owner of 16-64th parts or shares of and in a vessel called the *Pyramus*, all which belonged to and were registered at the port of *London*.

On 10 *June* 1830 the said *William Richardson* executed a bill of sale by way of mortgage of the said vessels called the *Lady East* and *Sprightly*, and of his said 16-64th parts or shares of and in the said vessel called the *Pyramus*, to *E. Whitmore* & Co., for securing the sum of 6500*l.* and interest; which said bill of sale also contained an assignment of the part, share, and proportion of the said *W. Richardson*, of

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and in the respective freights then earning or to be earned by the said vessels respectively, together with certain policies of assurance effected on the said ships or vessels respectively, and powers of sale of the said ships or vessels, parts or shares of ships or vessels and premises.

The said three vessels were at the date of the said bill of sale at sea.

On 12 *June* 1830 the said bill of sale was produced to the officers of the customs at the custom-house of the port of *London*, and the particulars thereof were entered in the book of registry of each of the said three vessels.

The said schooner or vessel called the *Sprightly* returned to the port of *London* on 18 *October* 1830, and sailed again on a voyage to the *Canary Islands* on the 16th day of the following month of *November*.

No indorsement of the said bill of sale from the said *W. Richardson* to *Whitmore* & Co. was made on the certificate of registry of the said vessel called the *Sprightly* during her stay at the port of *London* or at any other time, nor was the said certificate produced to the officers of the customs for the purpose of having such indorsement made thereon.

By an indenture or bill of sale bearing date 7 *January* 1831, and made between the said *W. Richardson* of the first part, *S. B. Cook*, therein described, of the second part, *E. A. Jones* and *H. M. Jones*, the petitioners, of the third part, and the said *Edward Whitmore* & Co. of the fourth part, (a copy of which deed accompanied the case and was to be taken as part thereof,) after reciting the respective certificates of registry of the said three several ships or vessels, and the said mortgage to *Whitmore* & Co. of 10 *June* 1830, the said *W. Richardson* did assign and transfer to the petitioners the said vessels called the *Lady East*

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and the *Sprightly*, and his said 16-64th parts or shares of and in the said vessel called the *Pyramus*, together with two several policies of assurance effected on the said ship *Lady East*, a policy of assurance for 800*l.* effected on the said ship *Sprightly*, and a policy of assurance for 1000*l.* effected on the part or share of the said *William Richardson* of and in the said ship *Pyramus*, and a certain sum of 6415*l.* 4*s.*, or so much thereof as should become payable for the hire of the said ship *Lady East*, under a certain charter-party of affreightment therein recited, whereby the said ship *Lady East* was let to freight to the *East India* Company for a voyage to *Fort William* in *Bengal* and back again to *London*, and all other monies payable to the said *William Richardson* under the said charter-party, and all the right, title, and equity of redemption of the said *William Richardson* of and in the said ships, freight, monies, and premises, subject nevertheless to the said prior mortgage to the said *Whitmore* & Co. for securing the payment to the petitioners of seven bills of exchange for several sums, amounting in all to the sum of 2999*l.* 0*s.* 2*d.*, and indorsed to the petitioners in substitution for or renewal of other bills of exchange then overdue. And the said last-mentioned bills of exchange were drawn by the said *S. B. Cock* upon and accepted by the said *W. Richardson* for the accommodation of the said *S. B. Cock*, and by the said *S. B. Cock* indorsed to the petitioners in payment for goods sold and delivered by the petitioners to the said *S. B. Cock* to the full amount thereof. And in the said bill of sale are contained covenants from the petitioners with the said *Whitmore* & Co. that it should be lawful for the latter to exercise their powers of sale without the consent or concurrence of the petitioners, and that the petitioners would join and concur with them in all proper and reasonable

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acts for assuring the said ships or vessels, and parts or shares of ships or vessels, to the purchaser or purchasers, if required by him or them, and enter into all proper deeds and instruments to enable the said *Whitmore* & Co. to receive the said freights, and all sums to become due on either of the said policies; and the said last-mentioned bill of sale also contained a proviso and declaration, that after payment of the said sum of 6500*l.* and interest to the said *Whitmore* & Co., the surplus of such monies as should arise from the sale of the said ships or shares of ships, and from the receipt of any money in respect of freight, or under either of the said policies, should be subject and liable to the payment to the petitioners of the said several bills of exchange, amounting together to the sum of 2999*l.* 0*s.* 2*d.*

A counterpart of the said indenture was executed by the petitioners on the requisition of the solicitors of *Whitmore* & Co. and delivered to their said solicitors for their use.

On 24 *January* 1831, the petitioners caused a notice in writing of their said mortgage to be given by their solicitor to *Whitmore* & Co., in which they were required not to make any further advances on the security of their said mortgage.

On or about 18 *January* 1831, the petitioners caused a notice in writing of the assignment to them of the sum of 6415*l.* 4*s.*, and other the freight and earnings of the said ship *Lady East*, payable or to become payable by the *East India* Company under the said charter-party of affreightment, subject to the said prior mortgage to *Whitmore* & Co., to be served on the said *East India* Company.

On several days between the 3 and 7 *May* 1831, inclusive, the petitioners caused notices to be served on the several underwriters whose names were subscribed to the said several policies of insurance and

on the *Indemnity Mutual Marine Insurance Company*, in whose office one of the said policies on the ship *Lady East* had been effected, of the assignment of the said several policies to the petitioners, subject to the said prior mortgage to the said *Whitmore* & Co.

On 11 *May* 1831, the petitioners caused their said bill of sale to be produced to the collector and comptroller of the customs of the port of *London*, and the same was entered in the book of registry of each of the said ships or vessels.

On 14 *June* 1831, the said *W. Richardson* committed an act of bankruptcy, and a commission of bankrupt, dated 16 *June* 1831, was duly issued against him, under which he was found and declared a bankrupt; the act of bankruptcy proved in support of the said commission having been committed on the said 14th day of *June* last.

On 5 *July* 1831, assignees of the said bankrupt's estate and effects were appointed, and the usual assignment thereof executed to them by the major part of the commissioners.

On or about 14 *June* 1831, the said ship *Pyramus* arrived in the port of *London*, and on or about the 15 *July* 1831, the said ship *Lady East* arrived in the said port of *London*.

On or about the 21st *June* 1831, the certificate of registry of the *Pyramus* was produced to the collector and comptroller of the customs in the port of *London* and duly indorsed by them; first, with the particulars of the said bill of sale or mortgage to *Whitmore* & Co.; and secondly, with the particulars of the said bill of sale or mortgage to the petitioners, and on the 16th *July* 1831, the certificate of registry of the *Lady East* was in like manner produced to the said collector and comptroller, and duly indorsed with the particulars of each of the said respective bills of sale.

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The said vessel called the *Sprightly* has been totally lost by perils of the sea while proceeding on the voyage insured by the said policy for 800*l*.

The said vessel called the *Pyramus* has sustained damage upon the voyage insured by the said policy for 1000*l*., effected on the said *William Richardson*'s interest therein as aforesaid, upon which policy an average loss has in consequence become payable.

The petitioners sought to have the deed of 7th of *January* 1831 established in their favour. This was opposed by the assignees of the bankrupt.

The questions for the opinion of the court were—

1st. Whether the deed of 7 *January* 1831, so far as it related to the interests in the ships which that deed purports to assign to the petitioners, was void, as against the assignees, by force of the ship registry act, 6 *Geo.* 4. c. 110. or not?

2d. Whether the same deed, so far as it related to the policies of insurance, and monies due from the *East India* Company therein mentioned, was void, as against the assignees, by force of the same act, or not?

*Maule* for the petitioners (viz. the second mortgagees). The bill of sale of 7 *January* 1831 is not void, whether considered as against the assignees or any other persons, for the bankrupt's interest in the ships has been duly entered in the book of registry and indorsed on the certificates thereof; but if it has not, no such omission has taken place as would avoid the bill of sale.

That conveyance being a mortgage to the petitioners of an equity of redemption, contains two distinct subjects of conveyance; the first, ships; the other, freight and policies of insurance; and whether it is valid as to either within 6 *Geo.* 4. c. 110. s. 39. is the question.

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First as to the ships. Two sets of facts are applicable; the one to the *Lady East* and the *Pyramus*, which did not arrive in port till after the bankruptcy, the other to the *Sprightly*, which did. As to the *Lady East* and *Pyramus*, the transfer being by bill of sale in writing, satisfied 6 *Geo.* 4. c. 110. s. 39(*a*). It was pro-

(*a*) Which enacts, "That when and after the particulars of any bill of sale, or other instrument by which any ship or vessel, or any share or shares thereof, shall be transferred, shall have been so entered in the book of registry as aforesaid, the collector and comptroller shall not enter in the book of registry the particulars of any other bill of sale, or instrument purporting to be a transfer by the same vendor or mortgagor, or vendors or mortgagors, of the same ship or vessel, share or shares thereof, to any other person or persons, unless thirty days shall elapse from the day on which the particulars of the former bill of sale, or other instrument, were entered in the book of registry; or in case the ship or vessel was absent from the port to which she belonged at the time when the particulars of such former bill of sale, or other instrument, were entered in the book of registry, then unless thirty days shall have elapsed from the day on which the ship or vessel arrived at the port to which the same belonged; and in case the particulars of two or more such bills of sale or other instruments as aforesaid, shall at any time have been entered in the book of registry of the said ship or vessel, the collector or comptroller shall not enter in the book of registry the particulars of any other bill of sale or other instrument as aforesaid, unless thirty days shall in like manner have elapsed from the day on which the particulars of the last of such bills of sale or other instrument were entered in the books of registry, or from the day on which the ship or vessel arrived at the port to which she belonged, in case of her absence as aforesaid; and in every case where there shall at any time happen to be two or more transfers by the same owner or owners of the same property in any ship or vessel entered in the book of registry as aforesaid, the collector and comptroller are hereby required to indorse upon the certificate of registry of such ship or vessel, the particulars of that bill of sale or other instrument under which the person or persons claiming such property who shall produce the certificate of registry for that purpose within thirty days next after the entry of his said bill of sale or other instrument in the book of registry as aforesaid, or within thirty days next after the return of the said ship or vessel to the port which she belongs, in case of her absence at the time of such entry as aforesaid; and in case no person or persons shall produce the certificate of registry within either of the said spaces of thirty days, then it shall be lawful for the collector or comptroller, and they are hereby required, to indorse upon the certificate of registry the particulars

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duced to the officer of customs and entered by them in the book of registry pursuant to s. 37. By that entry it became valid and effectual to pass the property as against all persons soever, and to all intents and purposes, except as against a class of persons who do not exist in this case.

Then if the entry in the books of registry of the second bill of sale of 7 *January* 1831, before thirty days had elapsed from the day on which the ships arrived at their port, was not *rite actum* by the customs officer, was it such a non-compliance with s. 39 of the act as to avoid the bill of sale?

That section must be governed by the intention declared in it, viz. that the several purchasers and mortgagees of such ship or vessel, share or shares thereof, when more than one appear to claim the same property, shall have priority one over the other, *not* according to the respective times when the particulars of the bill of

of the bill of sale or other instrument to such person or persons as shall first produce the certificate of registry for that purpose, it being the true intent and meaning of this act that the several purchasers and mortgagees of such ship or vessel, share or shares thereof, when more than one appears to claim the same property, shall have priority one over the other, not according to the respective times when the particulars of the bill of sale or other instrument by which such property was transferred to them were entered in the book of registry as aforesaid, but according to the time when the indorsement is made upon the certificate of registry as aforesaid: provided always, that if the certificate of registry shall be lost or mislaid, or shall be detained by any person whatever, so that the indorsement cannot in due time be made thereon, and proof thereof shall be made by the purchaser or mortgagee or his known agent, to the satisfaction of the commissioners of his majesty's customs, it shall be lawful for the said commissioners to grant such further time as to them shall appear necessary for the recovery of the certificate of registry, or for the registry *de novo* of the said ship or vessel under the provisions of this act, and thereupon the collector and comptroller shall make a memorandum in the book of registers of the further time so granted, and during such time no other bill of sale shall be entered for the transfer of the same ship or vessel, or the same share or shares thereof."

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sale or other instrument by which such property was transferred to them were entered in the book of registry as aforesaid, *but* according to the time when the indorsement is made upon the certificate of registry as aforesaid; and in the practice since the act, successive mortgages have been entered without waiting thirty days; *Hume*'s Customs Acts, 214.

Now the first mortgage is absolute, and is recited in the deed by which the equity of redemption is afterwards mortgaged. The property having passed to the mortgagees by the entry in the register, the premature making of that entry cannot avoid the conveyance, at all events, as against the assignees of the grantor, who are not within the exception in s. 37. Now what is prohibited by s. 39 to be done by the officers of customs, is the entry on the register of a second conveyance till thirty days have elapsed from the entry of a former like instrument, or from the day of the ship's arrival in port, if absent at the time of the first bill of sale. But the legislature intended to give every person claiming under a bill of sale thirty days in which to obtain an indorsement of his conveyance on the certificate of registry, so as to secure his title in case of conflicting claims. Nothing is here insisted on as being requisite by the act and omitted before the bankruptcy.

[Lord *Lyndhurst* C. B. Sect. 37 expressly provides that no bill of sale shall be valid and effectual to pass the property in a ship, till entered in the book of registry by the collector and comptroller of the port; and s. 39 afterwards specifies thirty days as the time for an absent ship to be in port before that entry can be made. Can you say that by registering this bill of sale before that time elapsed, it will be valid? Supposing this to have been a second mortgage simply, or a mortgage not reciting the first and conflicting in terms with it, could that argument apply?]

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The effect of sect. 37 cannot be to avoid the conveyance of a ship at sea, where a bankruptcy intervenes before her return. The act here complained of, is the entry by the officers of customs; but shall that be void because an act of bankruptcy occurs before the certificate could be indorsed? [Lord *Lyndhurst* C. B. The question is not whether the entry shall be void, but whether the bill of sale of 7 *January* 1831 is valid and effectual to pass the property? You rely on its having reserved the rights of the first mortgagees, for which it provides as well as for those of the second mortgagees.] Can the intervening bankruptcy of the assignor avoid his previous transfer of a ship, and render it incapable of receiving subsequent validity by indorsement on the certificate of registry? for the power of transfer existed at common law uncontrolled by registry acts. But the claims of the mortgagees do not here conflict; the first mortgagees were parties to the second conveyance, so that it can only be avoided by a decision of the court, that the words of s. 29 are not directory only, but expressly prohibitory. The opening words in s. 29, "any ship or vessel, or any share or shares thereof," apply to the same thing as the words "the same property in any ship or vessel" afterwards found there; and not to any other property in the ship, or to the equity of redemption, which is the residue of it, and is the subject-matter of the mortgage of 7 *January* 1831. Now statutes are construed by their intent as far as discoverable. Thus, in *Wathins* v. *Lewis*(*a*) the stat. 11 *Hen.* 7. c. 20. against the alienation by a widow of her estate *ex provisione viri*, was held not to apply to a case, which, though expressly included in its terms, was clearly without its mischiefs. *Eyston* v. *Studd*(*b*) was there relied on to show that the intent

(*a*) 1 Rus. & M. 585.

(*b*) Plowden's Com. 464; 14 Vin. Abr. 551, pl. 4.

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of statutes is more to be regarded and pursued, than the precise letter of them; for often things which are within the words of statutes, are out of the purview of them. *Co. Lit.* 45 *a*, shows that leases of church property made contrary to the disabling statutes of *Elizabeth* are good against the lessor, the prohibition having been established for the benefit of the successor.

*Morris* v. *Mellin* (*a*) was a case of much doubt; but Lord *Tenterden* says "It is a general rule in the interpretation of acts of parliament, that an enactment, the effect of which is to cut down, abridge or restrain any written instrument, shall have a limited construction;" and *Bayley* J. adds "It is a general rule that in order to avoid any written instrument by positive enactment, the words of that enactment ought to be so clear and express as to leave no doubt of the intention of the legislature." Here, supposing s. 39 to apply, the remedy may be against the officer for his wrongful act, without avoiding the instrument. He ought to take a minute of each conveyance brought to him, and make an entry thereof thirty days after the arrival of the ship, but an early entry secures the various parties entitled, who may search the book and obtain a copy of prior encumbrances (see s. 43.)

[Lord *Lyndhurst* C. B. A bill of sale registered too soon might be registered again, and so become valid from the time it was executed.]

But the act distinctly points out in s. 31. what transfer shall not be valid, as 26 *Geo.* 3. c. 60. s. 17., the previous act, had done; *Ratchford* v. *Meadows* (*b*), cited in *Heath* v. *Hubbard* (*c*). The former register acts contained as well clauses declaring transfers of ships to

(*a*) 6 B. & C. 446. 449. 450.
(*b*) 3 Esp. 69.
(*c*) 4 East, 115. 118.

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be null and void on failure to comply with certain requisites, as other clauses merely directory. Lord *Eldon* was of opinion that the clause respecting the registry was of the latter description, and that any defect in the form of registry did not make the sale void; nor would the irregularity of the clerk of the custom house in *London*, whose duty it was to make the entry, and to whom it had been regularly transmitted from *Liverpool*, where the ship was registered, destroy the validity of such a contract. Stat. 7 & 8 *Will.* 3. c. 22, s. 21. required the sale of a share in a registered ship to be acknowledged by indorsement on the certificate of the register before two witnesses; yet a sale without them was held not to be void, there being no provision in that act rendering void the conveyances of ships made contrary thereto; *Hodgson* v. *Brown* (*a*).

In *Dixon* v. *Ewart* (*b*) Lord *Eldon*, *Gibbs* C. J. and the late Lord *Tenterden* concurred in holding that a bill of sale divested the absolute property of a ship at sea, subject only to be divested by the vendor's neglecting to make the indorsement on the certificate of registry within ten days after the ship's return to port; and Lord *Eldon* said, that if a bankruptcy intervened before the arrival of the ship, the indorsement being only an act of duty on the part of the vendor, and passing no interest, might be performed by the bankrupt himself, or, as in that case, by his attorney constituted for that purpose before the bankruptcy. No question of reputed ownership can arise, except where the assignor remains in possession with assent of the true owner. Here, even assuming that an equity of redemption is such a "chattel" interest as can be the subject of reputed ownership by a bankrupt, in the bankrupt act

(*a*) 2 Bar. & Ald. 427. (*b*) 2 Merivale, 322.

choses in action are held included; *Ryall* v. *Rolle* (*a*). So, in *Ex parte Colvill* (*b*) the assignment of a life policy of insurance was held not to prevent the operation of 6 *Geo.* 4. c. 16. s. 72. if no notice be given to the office. In those cases the bankrupt was a legal owner. *Ex parte Richardson* in re *Cheshire* (*c*) decided that an uncertain interest in stock standing in the accountant-general's name, which had been mortgaged to secure a debt, and was afterwards transferred to the mortgagor without his privity, did not pass to his assignee as in his order and disposition at his bankruptcy. In *Greening* v. *Clark* (*d*) a vendor of goods pledged the delivery warrants, which had been left with him by vendee, and became bankrupt, but his interest in them was held not to pass to the assignees.

[*Bayley* B. The goods were in possession of pawnee at the time of the bankruptcy.]

As to the *Sprightly*; she returned before the bankruptcy, and was here thirty days, if the days of her arrival and departure are reckoned, so that she is not within the objection.

Secondly, is the deed of 7 *January* 1831 valid as to the freight and policies of insurance? Ship and freight may be so separated for this purpose, that this instrument may be void as it concerns the ship, but valid as to the freight; *Kerrison* v. *Cole* (*e*). In *Mestaer* v. *Gillespie* (*f*) the assignment was of ship and freight, but the indorsement on the certificate of registry required by 26 *Geo.* 3. c. 60. and 34 *Geo.* 3. c. 68. s. 16. not being made within ten days after the ship's return to port, the assignees of the mortgagors, who had become bankrupt, brought

(*a*) 1 Atk. 165. (*b*) 1 Montagu's Cases in Bankruptcy, 110.
(*c*) Buck's Bankruptcy Cases, 480. (*d*) 4 B. & Cr. 316.
(*e*) 8 East, 231. (*f*) 11 Ves. 621. 629. 645. 636.

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trover and got possession of her. An injunction having issued, Lord *Eldon* said, an important question struck him, whether, notwithstanding the register acts, the assignment was not good as to the freight? and held, contrary to *Moss* v. *Charnock* (a), that the sale of a ship at sea is valid, notwithstanding the vendors subsequently became bankrupts before her arrival in port, and therefore before the title was complete by indorsement on the certificate of registry; the other requisites of the registry acts having been previously complied with. On the point of freight, after consulting the Master of the Rolls, he said, "if by a separate instrument the equitable right in the charter-party had been assigned, that would have assigned the benefit of the covenant for freight from the *East India* Company. Next, is there any difference from that case, that the freight is assigned by the same bill of sale that assigns the interest in the ship. The question is important and doubtful." The facts being sufficient, an injunction was granted, but the suit was compromised. So in *Robinson* v. *Macdonnell* (b) Lord *Ellenborough* must have assumed that a transfer of freight would be good notwithstanding the registry acts. *Battersley* v. *Smith* (c) shows that even supposing this instrument void as to the ships, for contravening the registry laws, it would not be so *quoad* policies of insurance, or interest in contracts for freight entered into by the bankrupt with the *East India* Company.

*Follett* for the assignees of the bankrupt (the mortgagor). First, are ss. 37 and 39 applicable? and if they are, are they directory only, so that an entry made before

(a) 2 East, 399.
(b) 3 M. & S. 215.
(c) 3 Madd. 113. Leach, V.C.

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the time pointed out by them is good? They must be read together as directing what was to be done *quoad* the property in the ships. It is said that the question in reality is, whether the bill of sale is void altogether? The act of bankruptcy happened before the 30 days limited by s. 39 for making this entry. The assignees then became entitled to the property in the ships, if they had been registered according to law. The whole act would be rendered nugatory if one section is held directory and the other not, or unless both are held of equal force, and equally necessary to be complied with by parties. Now s. 37 applies to any transfer, and whether by way of mortgage or of sale must therefore be complied with. So in s. 39 it is "the bill of sale, or instrument *purporting* to be one," (which may be a transfer,) by the same vendor or mortgagor; thus clearly applying to the second mortgage as well as bill of sale. The words of the section, "of the same property in any ship entered in the book of registry as aforesaid," are said to show that it does not apply to a second mortgage, and that the property here mortgaged is not the same property. Now the ownership of a ship belonging to more than one owner is generally divided into 64 shares (s. 32), and the word *property* relates back to the previous part of s. 39, viz. to the same ship and the same share. Thus if *A.* mortgages 10-64ths, all he has, the officer of customs is directed not to register the mortgage till 30 days after her arrival in port; but if he only mortgages part, and afterwards mortgages the residue, the word *property* will apply only to what passed by the previous mortgage by the same mortgagor, whether the claims are consistent or conflicting. But the words of the act apply to a second mortgage, though the second mortgagee did not recover against the first: but suppose a first mortgage not to have

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been indorsed on the certificate of registry, then a second mortgage indorsed in time would be entitled to priority by the indorsement, but in neither case would the mortgagee be entitled by the deed.

[Lord *Lyndhurst* C. B. If the certificate was properly indorsed, what would be the effect of the bill of sale, and what estate would the mortgagee claim who had obtained priority by indorsement? Priority of indorsement on the certificate gives the indorsing mortgagee priority over other claimants, according to the estate he claims. Here, supposing the certificate properly indorsed, what would be the effect of his bill of sale, and what estate would he claim? For, by the instrument indorsed on the certificate as that under which he claims title, he claims it subject to a former conveyance.]

The object of the act being to prevent conflicting claims to the same property, if a second mortgagee had got the indorsement first, he would have been first entitled. No ship is duly registered so as to pass the property in her unless sections 37 and 39 are complied with. Then suppose that of three mortgages the first is not indorsed on the certificate of registry within 30 days, and that it should be held that the second mortgage, reciting the first, would not pass the property by indorsement within the time; a third mortgage not reciting either, but indorsed in due time, would have priority of the first, as not being well indorsed, and of the second, which, though properly indorsed, could not take priority from the first.

[*Bayley* B. The third would stand in the place of the first, but would not take priority over the second.]

A second mortgage, whether reciting the first or not, is equally within the words, which direct that second mortgages shall not be registered till after 30 days.

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[Lord *Lyndhurst*. If the mortgagee registers his bill of sale too soon, it is not valid or effectual till 30 days have elapsed from the return to port; but may not he correct the error then, and is not that act retrospective so as to operate from the date of the bill of sale, when the mortgagor might be in full credit, though his bankruptcy afterwards intervened before the registry could take place as directed?]

The premature entry by the officer is of no avail, for before the 30 days elapsed after which due entry could be made, the assignees' rights had arisen; the property having remained in them under the intervening act of bankruptcy, subject to the first mortgage. The 6 G. 4. c. 110. s. 46. which saves the rights of mortgagees of ships against acts of bankruptcy of mortgagors, though in possession and reputed ownership of them, only applies to ships duly registered. The question is not whether the act is directory, but whether it is of any avail.

The conveyance of *January* 1831 is expressly within section 39, viz. as a second mortgage by the same owner, though recited to be subject to a former mortgage.

As the *Sprightly* was not long enough in port to register duly, she is not differently situated from the other ships.

[Lord *Lyndhurst* C. B. A mortgagee, by being at a distance, might lose his chance of entry in the book of registry. Suppose a ship to sail from *Cowes* to *America*, and on her return voyage to *Hamburg* to touch at her port, *Cowes*, for two days, pursuant to liberty for that purpose, would that touching be within the act, so that the 30 days would begin to run? The proviso in case of detainer of the certificate of registry applies to a person detaining adversely, and not to the captain.]

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As to the policies of insurance and freight, the answer to all the cases cited to prove the assignment good as to them is, that the language of the register acts has been altered, to make transfers as well of freight as of ship void, if the requisites prescribed are not complied with.

*Mestaer* v. *Gillespie* was not decided. *Kerrison* v. *Cole* (*a*) arose on 26 *G.* 3. c. 60. s. 17. (enforced by 34 *G.* 3. c. 68. s. 14.) which enacted, that when the *property* in a ship is transferred by bill of sale, the certificate of registry should recite it, or the bill of sale should be void to all intents and purposes. Lord *Ellenborough* there says, that part of the instrument which operated as a bill of sale was vacated, but "not the whole instrument, which may happen also to contain any other independent contract between the parties," as in this case for freight.

Now 6 *G.* 4. c. 110. s. 37., in enacting that no bill of sale &c. shall pass the property in any ship or share thereof, adds, "or for any other purpose," until produced to the collector, &c. on purpose to prevent its operation as to freight as connected with the ship.

Only section 31 is here complied with; but sections 37 and 39 ought also to have been observed, in order to parting with the property; or the assignees whose right has intervened, have a prior right to those who have not brought themselves within the terms of the act.

*Maule* in reply. After the lapse of the 30 days, the entry on the register as made related back to the date of the bill of sale. The second bill of sale *purported* to be a transfer, because the *property* was out of the

(*a*) 8 East, 231.

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assignor by the first. No question of reputed ownership by the bankrupt arises.

*Cur. adv. vult.*

The following certificate was afterwards sent:—

This case has been argued before us by counsel. We have considered it, and are of opinion that the deed of the 7th of *January* 1831 is valid as to the interests in the ships which that deed purports to assign, as well as to the policies of assurance and the monies due from the *East India Company* therein mentioned, as far as choses in action can be assigned.

LYNDHURST.
J. BAYLEY.
W. BOLLAND.
J. GURNEY.

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## The Hon. W. R. CAPEL, Clerk, *against* CHILD and Another.

ASSUMPSIT for money had and received by the defendants to and for the use of the plaintiff. At

An incumbent regularly resided on a benefice containing more than 3000 inhabitants, and performed duty in the church, which was the only place of worship there. By requisition of the bishop, made under the authority of 57 *Geo.* 3. c. 99. s. 50, and stating, "on his own knowledge, that the duties of the benefice are inadequately performed," he was monished that if he did not nominate a curate with the stipend named, a curate would be appointed by the bishop. The requisition not having been complied with, the bishop appointed a curate, and on the incumbent's refusal to pay his salary, sequestrated the benefice for payment of the arrears. Held that the requisition was in the nature of a judgment affecting the character and property of the incumbent, and therefore that no opportunity having been afforded to the incumbent to show cause against the issuing it, it was insufficient to ground the bishop's subsequent proceedings; and that the incumbent was entitled to recover from the sequestrators the profits of his benefice received by them as such. *Semble*, that 57 *Geo.* 3. c. 99. s. 50, only applies to benefices where there is a plurality of churches and chapels.

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the trial before Lord *Tenterden*, at the *Hertfordshire* summer assizes in 1831, a verdict was found for the plaintiff, damages 5*l*. 13*s*., subject to the opinion of this court on the following case, with liberty to turn the case into a special verdict.

The plaintiff is, and for twenty years and upwards last past has been, vicar of *Watford*, in the county of *Hertford*, and in the diocese of the bishop of *London*. During the whole period of his incumbency the vicarage-house at *Watford* has been his ordinary place of abode.

The vicarage is a benefice with cure of souls. There is only one church belonging to the benefice, and no chapel. The population exceeds 5000.

The proceedings of the bishop hereinafter stated were grounded on the 50th section of stat. 57 *Geo*. 3. c. 99.

On 12th *January* 1830, a requisition was issued by the bishop of *London* to the plaintiff in the words following:—"*Charles James*, by divine permission, bishop of *London*. To the honourable and reverend *William Capel*, clerk, vicar of the vicarage and parish church of *Watford*, in the county of *Hertford*, and within our diocese and jurisdiction: *Whereas it appears to us, of our own knowledge, that the ecclesiastical duties of the said vicarage and parish church of Watford are inadequately performed by reason of your negligence*, we do, therefore, under and by virtue of an act of parliament made and passed in the 57th year of the reign of his late majesty King George the Third, intituled "An act to consolidate and amend the laws relating to spiritual persons holding of farms, and for enforcing the residence of spiritual persons on their benefices, and for the support and maintenance of stipendiary curates in England;" monish and require you to nominate to us a fit person, with a stipend of not less than 75*l*. per

annum, to be licensed by us to assist in performing the ecclesiastical duties of the said vicarage and parish church of *Watford*, further admonishing you that if you shall neglect or omit to make such nomination for the space of three months after this requisition, we shall proceed to appoint a curate, according to the tenor of the said act. Dated, &c.

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This requisition was served on the plaintiff on 18 *January* 1832. It was not founded on any affidavit, and there being no file in the registry of the bishop's court for the reception of such documents, was, in the same manner as other documents of a similar description are usually deposited there, deposited in the said registry on the 19 *January* 1832.

The plaintiff did not appoint a curate pursuant to this requisition, nor appeal to the archbishop of the province to which the said bishop belonged, and on the 2 *July* 1832, the bishop licensed the reverend *Arthur Hubbard*, clerk, to the office of stipendiary curate in *Watford*, and (by the same instrument of licence), assigned him the yearly stipend of 75*l.* to be paid quarterly, for serving the said cure, and also a further sum of 15*l.* per annum in lieu of a house, and directed that he should reside in the parish.

The bishop caused a copy of this license to be entered in the registry of the diocese of *London*, on 25 *August* 1832, and on the same day a copy was transmitted by the registrar of the diocese, by the post, to the churchwardens of the parish of *Watford*.

The plaintiff refused to permit Mr. *Hubbard*, who has ever been ready to assist in the duty since he was licensed to act as his curate, though Mr. *Hubbard* tendered himself for that purpose, and on that account no part of the duty of the benefice has been performed by him.

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On 22 *February* 1831, the bishop of *London* issued a mandate, or summons, to the plaintiff, under his hand and private seal, which, after reciting the monition of the 12th day of *January* 1830, and licence above set forth, concluded by stating that it had been represented to the bishop that on 2 *January* 1830 the sum of 37*l.* 10*s.* was due to the said *Arthur Hubbard*, for half a year's stipend so assigned to him as aforesaid, and called on plaintiff to show cause at *London-house*, on a day fixed, why such stipend should not be paid, and to hear and receive the bishop's determination on the premises, intimating that if plaintiff did not appear, or appearing did not show good cause, the bishop would proceed as empowered by the act.

A duplicate of this mandate or summons was duly served on the plaintiff, who did not attend the bishop pursuant thereto, and on the 4th *March* 1831, the bishop issued a monition under his hand and seal to the plaintiff, which, after reciting the said monition of 12 *January* 1830, and that a "difference having arisen between the plaintiff and the said *Arthur Hubbard* touching the said stipend or allowance or the payment thereof, the bishop had issued his mandate of 22 *February* 1821," monished and directed the plaintiff to pay the said sum of 37*l.* 10*s.*, and thereafter to pay and discharge such stipend quarterly, and also the said sum of 15*l.* yearly, as the same should become due, by virtue of the said licence, and to make a return to that monition into the bishop's registry.

This last-mentioned monition was served on the plaintiff on 9 *March* 1831, and on 6 *April* 1831, the plaintiff, by his proctor, duly made and filed in the registry of the bishop's court, a return to such monition, which (after stating the two monitions) denied that the ecclesiastical duties of the said vicarage and

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parish church ever were inadequately performed, or that the said plaintiff was negligent in the performance thereof, but on the contrary alleged, that ever since the induction of the plaintiff to the said vicarage and parish church, in 1799, he had been resident on his said benefice, and had performed the ecclesiastical duties of the said parish regularly and properly. The return then stated s. 50 of 57 *Geo.* 3. c. 99, enacting, that the requisition thereby required should be filed, and alleging that it was not so filed till 2 *December*; also that on 5 *July* 1830 a caveat had been entered by plaintiff's proctor, in the registry of the diocese, against the appointment of a stipendiary curate, notwithstanding which the licence to the Rev. *Arthur Hubbard*, dated 2 *July* 1830, was received at the registry on 25 *August* 1830; also that the said bishop was not, by the said act, authorized to assign to the said Rev. *Arthur Hubbard* any sum of money in lieu of a house, he the said plaintiff being resident at the vicarage-house of the said parish; and further (after reciting s. 70 of 57 *Geo.* 3. c. 99,) that a copy of the licence was not registered in the bishop's registry till 25 *August* 1830, though the licence then appeared in the books as having been registered on 2 *July*, and that no copy of the licence was transmitted to or received at *Watford* by the churchwardens till 28 *August* 1830; and that the said Rev. *Arthur Hubbard* had not since his appointment performed any duty in the said parish or parish church, nor was it requisite or necessary that he should do so, by reason that the said plaintiff, as well before the issuing of such licence as subsequent thereto, had himself regularly and properly performed the ecclesiastical duties of the said parish and parish church as vicar thereof; and the said proctor submitted to the law and judgment of the court, that by reason of the premises the said monition

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had been improperly issued; and prayed the judge of the court to pronounce this the return of the said party thereto to be sufficient, and to dismiss the said plaintiff from the said monition, and all further observance of justice therein.

On 12 *April* 1831, an order was issued by the bishop under his hand and seal to the plaintiff, which, after reciting the monition of 4 *March*, its due service on the plaintiff on 9 *March*, and that a paper writing, purporting to be a return, had been made thereto on behalf of plaintiff, but not stating reasons satisfactory for non-payment of the said stipend, required the plaintiff to pay the 37*l.* 10*s.* as before.

That order was served on the plaintiff on 15 *April* 1831: the plaintiff did not obey the same, and on 16 *May* 1831, the bishop issued a sequestration under his hand and seal, whereby he sequestered the fruits, profits, and other ecclesiastical emoluments of the said vicarage of *Watford*, and appointed the defendants to be the sequestrators, enjoining them to ask for, collect, levy, and receive the profits, and the same so collected, &c. to sell, and with the same so collected, &c. to pay to the said *Arthur Hubbard*, as curate of the said parish, the sum of 37*l.* 10*s.* for half a year's stipend assigned to him by the licence aforesaid, with all their costs, charges, and expenses, incurred or to be incurred in relation to the said sequestration, or any other proceedings incident thereto, and committing to them the bishop's power and authority "until he should think fit to relax the same."

On 11 *June* 1831, the defendants, as sequestrators, demanded and received from the executors of one *R. C.* deceased, the sum of 5*l.* 18*s.*, being the amount of certain fees due to the said plaintiff, as vicar, on the interment of the said *R. C.* in the church-yard of the said parish of *Watford*, and gave a receipt in

writing for the same, as received on account of the plaintiff, as directed by the lord bishop of *London*, under the sequestration.

The plaintiff, subsequently and before this action was brought, required the defendants to pay the said sum of 5*l*. 13*s*. to him, which they refused to do.

The questions for the opinion of the court are,

1. Whether the bishop, under the circumstances before stated, had any authority, by virtue of the act of 57 *Geo.* 3. c. 99. to appoint a curate.

2. Supposing him to have such authority, whether the licence granted to Mr. *Hubbard*, dated 2d *July* 1830, was a valid appointment of him as curate under the provisions of the said act.

3. Whether the bishop was authorized by the said act to enforce the payment of the stipend appointed to Mr. *Hubbard* by monition and sequestration.

4. Whether the proceedings of the bishop are not void for irregularity.

If the court shall be of opinion in favour of the plaintiff, or any of these questions, the verdict was to stand, otherwise a verdict is to be entered for the defendants.

The case was argued twice; first in *Easter* term, by *Turner* for the plaintiff, and *Platt* for the defendants; and afterwards in *Trinity* term by the king's advocate, Dr. *Jenner*, for the plaintiff, and Dr. *Dodson* for the defendants.

*Arguments for the plaintiff.*—1. The bishop could not, at common law, appoint a curate, for the incumbent, having cure of souls co-extensive with the whole of his parish, has the exclusive power over his pulpit; *Farnworth* v. *Bishop of Chester* (*a*), *Rex* v. *Bishop of London* (*b*), *Rex* v. *Field* (*c*), *Rex* v. *Bishop of Exeter* (*d*),

(*a*) 4 B. & Cr. 555, 569.
(*b*) 1 T. R. 333.
(*c*) 4 T R. 126.
(*d*) 2 East, 462.

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*Rex* v. *Bishop of Oxford*(*a*); and has a right to act on his own judgment as to what person shall deliver doctrine within his parish without being bound to trust to that of the ordinary; *Farnworth* v. *Bishop of Chester* (*b*).

Nor since 57 *Geo.* 3. c. 99. s. 50 (*c*), can the bishop appoint a curate where, as in this case, the incumbent resides, unless there are more churches or chapels than one, and unless after a sufficient hearing of both parties it is proved to the judicial satisfaction of the bishop that the duty is inadequately performed.

The enactments on this subject, which precede those

(*a*) 7 East, 345. (*b*) 4 B. & Cr. 570.

(*c*) Which enacts, "That whenever it shall appear to the satisfaction of any bishop, either of his own knowledge, or upon proof by affidavit laid before him, that by reason of the number of churches or chapels belonging to any benefice locally situate within his diocese, or the distance of such churches or chapels from each other, or the distance of the residence of the spiritual person serving the same from such churches or chapels, or any or either of them, or the negligence of the spiritual person holding the same, that the ecclesiastical duties of such benefice are inadequately performed, such bishop may by writing under his hand require the spiritual person holding such benefice to nominate to him a fit person or persons, with sufficient stipend or stipends, to be licensed by him to perform or to assist in performing such duties, specifying therein the grounds of such proceeding; and if such spiritual person shall neglect or omit to make such nomination for the space of three months after such requisition so made as aforesaid, then and in every such case it shall be lawful for such bishop to appoint a curate or curates, as the case shall appear to such bishop to require, with such stipend or stipends as such bishop shall think fit to appoint, not exceeding in any case in the whole the stipends allowed to curates by this act, nor, except in the case of negligence, exceeding one-half of the gross annual value of the benefice, although the spiritual person to whom such churches or chapels shall belong shall actually reside or serve the same: provided always, that such requisition, and any affidavit made to found the same, shall be forthwith filed by the bishop in the registry of his Court: provided also, that it shall be lawful for any such spiritual person, who shall think himself aggrieved by any such appointment of such curate or curates, to appeal to the archbishop of the province to which such bishop shall belong, in such and the like manner, and under such provisions and directions, as are allowed to any spiritual person thinking himself aggrieved by any sequestration issued by any bishop."

of 57 *Geo.* 3. c. 99. and are repealed by that act, were 12 *Ann.* st. 2. c. 12. which only related to the salaries of curates nominated by incumbents (*a*), 36 *Geo.* 3. c. 83. applying only to the curates of non-resident incumbents (*b*), and 53 *Geo.* 3. c. 149, which provided by sect. 2, for curates to be appointed and licensed by the bishop in cases of non-resident incumbents. That section is replaced by s. 53 of 57 *Geo.* 3. c. 99.; and Lord *Tenterden* says, in *Rex* v. *Bishop of Peterborough* (*c*), that the 50th section of that act is the only section entirely new and not taken from some clause in the preceding acts. Though that adjudication did not proceed on sect. 50, the court remarked that the power to proceed by nomination in any case regarding the stipend of the curate of a resident incumbent is so questionable, that it might be a fit subject for the consideration of the legislature. Sect. 50 then, which confers power on bishops in derogation of the civil rights of incumbents, must be construed strictly; *Rex* v. *Croke* (*d*); *Rex* v. *Faraday* (*e*); and applies only where there are more churches or chapels than one, "the same" being served by one spiritual person; for idem semper proximo, *Co. Lit.* 20 *b.* (*f*) So s. 48 provides for appointing a curate in case of the absence of the incumbent of a benefice having but one church or chapel. [Lord *Lyndhurst* C. B. Had the requisition proceeded on affidavits they might have been met by counter affidavits. How can the inadequate performance of the duties appear to the "satisfaction" of the bishop, *viz.* so as to enable him to exercise his judgment, which is the import of that word, without the matter having been brought to issue by the statements in answer of the party charged? It does not appear that the plaintiff had any notice so as to enable him to obtain a proper

(*a*) 3 B. & C. 50. (*b*) Id. 51.
(*c*) 3 B. & Cr. 57. Trin. 5 *Geo.* 4. (*d*) Cowp. 26, 29.
(*e*) 1 B. & Adol. 275, 281. (*f*) And see 1 B. & Ald. 327.

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bearing before the bishop. Again, if the bishop proceeded on his own knowledge without proof by affidavit, how could the party know his grounds of appeal to the archbishop? It would be too critical to interpret the terms, "his own knowledge," to mean his personal knowledge.]

In the ordinary course of an ecclesiastical tribunal, where proceedings take place promoted by the judge himself, a libel containing articles of accusation is found in the court, to which the party inculpated has an opportunity to plead by way of answer; after which only the judge assumes his character as such. So in this proceeding by requisition, it was for the bishop as charging party to state the special instances of neglect of duty by the plaintiff, so as to be individually traversable; nor was it sufficient to charge negligence generally. See per *Ashurst, J.*, *l'Anson* v. *Stuart* (*a*), *Holmes* v. *Catesby* (*b*), *Jones* v. *Stevens* (*c*), *Duncan* v. *Thwaites* (*d*), *Carr* v. *Jones* (*e*).

How can an appeal take place where a benefice is situate in the peculiar of an archbishop or within his diocese? (*f*)

2dly. The curate not being nominated by the incumbent, is not duly appointed; for by the general law the incumbent nominates the curate and the bishop licenses him (*g*). The mere effect of a license is to render the person licensed eligible by the incumbent to officiate (*h*); but 57 *Geo.* 3. c. 99. s. 50. contem-

(*a*) 1 T. R. 752; Burn's Ecc. Law, tit. Benefice.

(*b*) 1 Taunt. 543. (*c*) 11 Pri. 235, 278. (*d*) 3 B. & Cr. 556.

(*e*) 3 Smith's R. 491. So if a party presented to a benefice is refused on the ground of immorality, the truth of the facts alleged against him might be tried by a jury, to whom he had a right to appeal. *Per Cur.* *Rex* v. *Marquis of Stafford*, 3 T. R. 648.

(*f*) See 57 *Geo.* 3. c. 99. s. 71.

(*g*) 2 Burn's Ecc. Law, 55 b. 61, 8th edit. See Degge's Parsons' Counsellor, Appendix, No. X, Appointment of Curate.

(*h*) See last note, and *Rex* v. *Bishop of London*, 1 Wils. R. 11.

plete an appointment not merely subject to the bishop's license, but compulsory on the incumbent. Then as the bishop's authority to appoint even in case of inadequate performance of duty is given by statute, it should have been shown to have arisen on the face of the requisition or appointment of the curate. Thus an order of removal not showing the power delegated to justices by the legislature is void (*a*), and a conviction on the game laws must negative the defendant's qualifications (*b*).

[Lord *Lyndhurst* C. B. The bishop gives the curate authority, and assigns him a salary. The question is, whether that is an appointment?]

3dly. The curate thus appointed could not recover his salary by monition and sequestration. *Rex* v. *Peterborough* (*c*) shows that *57 Geo.* 3. c. 99. s. 53. only applies to curates of non-resident incumbents, and throws strong doubt on the power of proceeding by monition for the salary of the curate of a resident incumbent. [Lord *Lyndhurst* C. B. What was there said respecting s. 53 is to be taken with reference to the subject-matter of that case only.] Sect. 53 cannot apply to a compulsory appointment of a curate by a bishop under s. 50; nor has there been any "difference" respecting the amount of salary so as to vest the bishop's jurisdiction, for the curate's appointment is altogether disputed. The bishop had no power to direct a quarterly or any but an annual payment of the salary. *Bac. Abr. tit. Rents* (F).

[*Bayley* B. *36 Geo.* 3. c. 83. s. 3. might have been considered as virtually adopting *12 Ann.* st. 2. c. 12. s. 1. by which the bishop was at that time empowered to appoint the times of payment of a curate's salary; a discre-

(*a*) See 2 Nolan, 215, 4th edit.

(*b*) *Rex* v. *Jarvis*, 1 Burr. 148; 1 East, 443, *n. S. C.* Paley on Convictions, by Dowling, 115—119. *Rex* v. *Turner*, 5 M. & S. 206.

(*c*) 3 B. & Cr. 49.

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tion governed by the incumbent's circumstances, as *e. g.* at what time of the year his principal income was payable, &c.]

The bishop had no power to appoint the payment of money in lieu of a house, the incumbent being resident during the year; see 36 *Geo.* 3. c. 83. s. 1.; 57 *Geo.* 3. c. 99. s. 54.

4thly. The sequestration is bad, for the power of the sequestrator is to continue till the bishop thinks fit to relax it, *i. e.* till further order, and not, according to s. 53. "till payment of the stipend or arrears" is made. No provision is made for costs by s. 53. as in s. 26. If the bishop could only appoint the curate's salary to be paid annually, he could not sequester for half a year's arrear.

*Arguments for the Defendant.*—It appeared to the satisfaction of the bishop, on his own knowledge, that the duties of the parish had been inadequately performed, and he had thereupon power, under 57 *Geo.* 3. c. 99. s. 50. to require the plaintiff to appoint a curate, and on his neglecting to do so within three months, to appoint one himself and fix him a salary; for stat. 57 *Geo.* 3. c. 99. is a remedial as well as penal act, intended to apply to all cases of negligence by incumbents, without being limited by the circumstance whether there are more than one church or chapel on the benefice or not. The remedy by appeal given by s. 50. shows the bishop's power to adjudicate on the inadequate performance of the duty. The plaintiff not having appealed admitted the charge, and thereby called on the bishop to insure a due performance of parochial duties by appointing a curate.

[Lord *Lyndhurst* C. B. The requisition by the bishop to appoint a curate is not a mere charge, it is a judgment affecting the character and property of the incumbent. Is there any case in a court of competent

jurisdiction where such a judgment can take place without its having been stated what the defendant had done, and, in the first instance, hearing the party charged?]

The requisition sufficiently negatives the adequate performance of the duty, by stating the neglect in the general words of the enactment. Unless the whole facts of negligence in evidence must be stated, the cases of convictions do not apply.

2. The object of s. 50. being the appointment of a curate, it should be read together with s. 53. which respects his salary. That appointment is a suggestion which stands in the place of the judgment, and the appeal is provided rather as a mode of trying the propriety of the curate's appointment, than an appeal from a judgment originally had.

[Lord *Lyndhurst* C. B. The plaintiff has had no opportunity of being heard before the bishop on the original charge. In cases of mandamus a day is given to the party to appear. On a *scire facias quare executionem non*, the *scire facias* operates as a summons to the defendant. So on a writ of error the defendant has been heard in the court below. The term "appeal" imports an original judgment to be appealed from, and is from a decision had on hearing, not from a mere charge. A judge cannot decide on his own knowledge without a hearing of facts.

[*Bayley* B. It would have been correct in the bishop to have summoned the plaintiff to show cause why a monition should not issue against him, and why a curate should not be appointed, on grounds of negligence stated therein.(*a*) The plaintiff might then have shown such cause as to convince the bishop that the view he at first entertained was unfounded. Upon

(*a*) See Stra. 567.

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the general principles of administering justice in this country, facts cannot judicially appear but on statements on oath; viz. either by personal testimony of a witness, or by affidavit, to which a party may have an opportunity to answer.]

S. Unless the requisition is held insufficient on sect. 50. the general words of sect. 53. "stipend, salary or allowance," authorized the bishop to enforce payment of the curate's salary and annual allowance in lieu of a house by monition and sequestration. Sections 50, 53 and 54, must be read together.

As to the times of payment of the curate's salary, the bishop may fix them at periods short of a year, in order to maintain him *de die in diem* in the due performance of his clerical duties, and with reference to the particular sources of profit in each benefice. The terms of s. 50 and s. 55 are "any salary not exceeding *l.* per annum."

The allowance of 15*l.* in lieu of a house may be supported under sect. 54.

4. The object of the legislature was to sequester so much of the profits as should pay the stipend, and also the necessary expenses of obtaining these profits, (*e. g.* tithes,) without which the stipend could not be paid.

[Lord *Lyndhurst* C. B. The sequestration is not confined merely to the costs of selling the tithes, but the general law applicable to sequestrations would apply.]

The act done, and not the excess of the authority given, is now to be considered.

[*Bayley* B. More should not be levied than the arrears and the costs of obtaining them, but these sequestrators have power to go on till further order of the bishop. There are cases where a warrant for levying the aggregate of several sums has been held bad as to all if bad as to one. Sect. 26 expressly directs the payment of expenses in another case.]

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Lord LYNDHURST C. B.—We have enjoyed the advantage of the fullest assistance which could be afforded us by the bar, for on both occasions the case has been most satisfactorily argued. Nothing however which I have heard on either occasion has altered the opinion I originally entertained upon this question. A particular authority is here given to a bishop under an act of parliament, and the question is, whether he has properly pursued that authority? I am of opinion that he has not. I must say, in the first instance, that I do not found my judgment on the construction of sect. 50 of 57 *Geo.* 3. c. 99. on the point, Whether the authority there given is confined to the case of a benefice possessing a plurality of churches or chapels, or having only one? but I rest it on an entirely different ground. The authority given by this statute to the bishop must be strictly pursued. That authority empowers him to decide, either on an affidavit laid before him or upon his own knowledge, whether the ecclesiastical duties of any benefice locally situate within his diocese, have been inadequately performed, "by reason of the number of churches and chapels belonging to it, or the distance of such churches or chapels from each other, or the distance of the residence of the spiritual person serving the same from such churches or chapels, or any or either of them, *or* the negligence of the spiritual person holding the same." This must "appear to his satisfaction" as a conclusion, either on proof by affidavit laid before him, or from what he knows of his own knowledge. Let us in the first place consider the first of these cases, viz. that it shall appear on proof (by affidavit) that the duties of the benefice are inadequately performed. Does not that import an inquiry, and a judgment founded on that inquiry? It *appears*—how? —from affidavits laid before him. But the act does not mean that affidavits on one side only are to

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have power to affect a person in his character and property, without any opportunity being afforded him of meeting them by counter affidavits; without, indeed, a summons for him to appear and answer; and in this instance there was none. The requisition proceeds from the bishop immediately, without intimation or warning to the other party. I do not think that that is sufficient. If this is the construction of that part of the act where the proceedings are to be on affidavit, with a view to inquiry, it is a necessary consequence that where the proceedings are taken on his own knowledge, there should also be some intimation to the opposite party, who has a right to be heard, in order to explain the charge against him, and to undeceive the bishop, if he has mistaken any circumstance on which he has grounded that charge. If this requisition is to be considered as a judgment, it is against every principle of justice that that judgment should be pronounced, without the opportunity of that other party being heard against it, and even without any notice of the intention of the judge to pronounce it. The language of the requisition imports a judgment. "Whereas it appears to us, of our own knowledge, that the duties of your benefice are inadequately performed by reason of your negligence." That is in its terms and consequences a judgment, and every principle of justice requires that our holding of the construction of the act should be to decide that a previous inquiry is necessary. Then according to the language of the act (sect. 53) a summons is required, and has been issued in this case; but not till a subsequent day after the requisition, when there was a mandate to the plaintiff to appear and show cause; but against what was he to appear and show cause? against the requisition which he might contend ought to be cancelled? No, but only why a certain amount of salary should not be paid. If the defendant

had attended he would not have been allowed to show cause against the original judgment. That that is so is clear; for after that mandate a monition was issued, and in the answer made thereto by the proctor, on the part of the present plaintiff, to the charge preferred against him, it was expressly negatived that the duties ever were inadequately performed, &c., and it was alleged, that since the plaintiff's appointment as vicar, he had regularly performed the duties. What was the reply of the bishop? The reply stated, that "such answer does not appear to us a sufficient reason why the stipend should not be paid." So that the bishop thought the only question then was as to the payment of the stipend, and the original charge was considered as a question he the vicar was not competent to enter into. It has been argued that the party has a right to appeal to the archbishop; but where there is an authority to pronounce a judgment, and an appeal is given, the party proceeded against has a right to be heard before the original judgment takes place, for the purpose of preventing that event; and the circumstance of the subsequent right of appeal makes in that respect no difference. But if the appeal is given, from what is it to lie? Not from the requisition, but from the nomination or appointment of the curate, which is the consequence of the judgment. Again, what was there to appeal against? How was he to know what was imputed to him? Sect. 50 provides that the bishop must specify in his requisition the grounds of such proceeding; that requisite is not satisfied by the general allegation of "inadequacy of the performance of the duties," without declaring the grounds of that allegation; and that is the more necessary where the charge against the incumbent is not on affidavits, which might disclose what were the particular charges he would have to meet, but is "upon the knowledge of the bishop," which knowledge the bishop

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carries in his own breast. Here is a new jurisdiction created by giving authority to the bishop to pronounce a judgment; and according to every principle of law and equity, that judgment ought not to be pronounced, or if pronounced cannot be sustained, if the party against whom it has been pronounced has not been heard in his own defence. Here he has not only not been heard, but has not been even summoned to a hearing; the first proceeding is therefore altogether invalid, and consequently the rest of the proceedings cannot be sustained.

BAYLEY B.—I am of the same opinion, and on the ground of the insufficiency of the requisition. Every step has been founded on that, and if that is removed, every thing founded on it must be considered to be removed also. Prior to 57 *Geo.* 3. c. 99. the bishop had no right to proceed in the way in which sect. 50 of that act now authorizes him to do. That clause invests him with a qualified power, and if he does not pursue it in the terms in which it is given, he cannot justify his act. I do not proceed on the ground that the statute gave this jurisdiction only where there was a plurality of churches or chapels belonging to the benefice. The language of the act may appear to give a great countenance to that belief, but I think it is not necessary to combat that difficulty in this case. The grounds on which my opinion proceeds are, that in this case it is not said judicially, that it has appeared to the satisfaction of the bishop that the duties of the benefice are inadequately performed; and further, that whereas this clause authorizes him to act, provided he specifies the grounds on which he acts, those grounds are not specified here. The language of the beginning of the clause is important. The affidavit of the party making the charge is not sufficient, for the incumbent

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might be able to shew that the party making such affidavit was guilty of perjury, or was an infamous person, or by counter affidavits might explain away the acts charged. On the general principles of law, it would be essential, if the bishop proceeded by affidavit, to give the opposite party the opportunity of being heard in answer. If, however, the bishop proceeds on his own knowledge, still it could not appear to his satisfaction on his own knowledge, unless he stated what his own knowledge was, and gave the party the opportunity of answering it. It is not necessary that the delay which is incident to a suit in the ecclesiastical court should occur. It is sufficient if the bishop calls on the party making the charge, to state the grounds of the accusation of negligence, and if he asks the party charged whether there are grounds on which that charge can be answered. The character of all judicial proceedings is, that the party against whom those proceedings are taken should be heard. No proceedings can be had in a court of law but by first entering an appearance for the person proceeded against. In case of proceedings before magistrates, if the conviction does not state that the party appeared or was summoned, it is bad. If you remove a pauper who has not been summoned, he is entitled to be restored to his original parish. I know no case where you judicially proceed without giving the other party an opportunity of being heard. In *Rex* v. *Benn* (*a*), Lord *Kenyon* states it as an invariable principle of law, that no punishment can be awarded against a party without his being heard. It is impossible to say that this is not in the nature of a judicial proceeding. What is its effect? It is, that for so long a time as this curate shall continue in possession of the curacy, the vicar is deprived of the profits of his benefice. I say it could not legally appear to the satis-

(*a*) 6 T. R. 198.

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faction of the bishop, that the vicar was negligent in the performance of the duties, so that the foundation of the whole proceeding is gone. Next, by sect. 50, the bishop is to specify the grounds of the proceeding. Whether the bishop acts on affidavit laid before him, or on his own knowledge, he must specify the grounds on which he acted, not merely the nature of the proceeding which he has taken. The duty in the church may be well performed, but there may be other parochial duties which may be neglected. The incumbent may perform many particular duties regularly, and neglect some others; he is at all events entitled to see the nature of the charge which he is called on to answer. It appears to me that the bishop did not pursue the authority with the restrictions under which it was given, and therefore that the proceedings taken by him cannot be sustained.

VAUGHAN B. I concur with the opinions already delivered. The first question is, has the bishop any jurisdiction? and if so, has he performed what the act requires him to do in exercising it? I think that under the particular circumstances of this case he has not given himself jurisdiction. Sect. 50 appears to me only to apply to give power to a bishop in a benefice where there is a plurality of churches and chapels. Under all the circumstances, there being no citation, the terms of the act do not seem to me to have been complied with, and the condemnation of the plaintiff without giving him the opportunity to answer, is foreign to the first principles of justice. The bishop is called on to "specify" the grounds of the negligence he charges against the party, in order that the party may have an opportunity to answer that charge by affidavit or some other means, or such a charge might subtilly

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be made to operate to a party's disadvantage. It seems to me that the bishop had no jurisdiction in this case to appoint a curate, because there was no plurality of churches or chapels on the benefice, and that if he has jurisdiction, the authority given him by the act has not been properly pursued.

BOLLAND B.—I am of the same opinion. Had not this case been of great moment, I should not have added any thing on it, after the judgments which have been delivered. My opinion proceeds, first, on the want of jurisdiction stated by my brother *Vaughan*, and next on the other grounds adopted by Lord *Lyndhurst* and my brother *Bayley*, as to the insufficiency of the requisition. I do not consider the first ground an extra judicial point, and therefore consider myself called on to deliver my opinion on it. It has been attempted to separate the words "or the negligence of the spiritual person holding the same," from the rest of the section, so as to set up the authority of the bishop in cases of benefices having but one church or chapel. Now the leading words of the section are, "by reason of the number of the churches or chapels:" the fourth member of that clause is, "or the negligence of the spiritual person *holding* the same," and these words seem to me to be put in contradistinction to the words "spiritual person *serving* the same." Assuming this to be the correct view, it will take from the bishop any jurisdiction whatever in this case; but supposing it to be wrong, I can have no doubt on the other grounds. The bishop has proceeded to condemn this party on his own knowledge; though I will not go the length of the king's advocate, that the bishop *can* have no knowledge of his own, or that he cannot be so well acquainted with the parish as to

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know that the duties are inadequately performed, it is enough to say, that the statute requires the specification of the grounds of the proceeding, and that the bishop has not complied with that condition in this case.

Judgment for the plaintiff.

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## DOE *dem.* BARKER *against* GOLDSMITH.

Leasehold was bequeathed to *A.* in trust to permit and suffer *B.*, the widow of testator, to have, take and receive the rents during her life or widowhood, and on her death or remarriage, in trust to sell and divide the produce between *C.* and *D.*, testator's sons.

*A.* the trustee, *B.* the widow, and *C.* the son, join in a lease to *D.* for the residue of the term, he rendering rent to *B.* and *C.*, with power of re-entry to *A.*, *B.* and *C.*, the survivor of them, and the executors of the survivor. The widow *B.* survived *A.*—Held, that the legal estate in the leasehold vested in *A.* only, and therefore that the power of re-entry reserved to *B.* could not be exercised by her.

EJECTMENT on the demise of *Sarah Barker*, for certain leasehold premises in *Duval's Lane, Islington*. At the trial before *Gurney* B. at the *Middlesex* sittings, the following appeared to be the facts of the case.

*William Barker* by his last will, dated in 1816, bequeathed to *J. Roberts* and *J. Shirven* the premises in question, to hold the same to them, their executors, administrators and assigns, for the residue of that term, upon trust to permit and suffer his wife *Sarah* (the lessor of the plaintiff) to have, take and receive the rents, issues and profits thereof, during the time of her natural life, if she should so long continue a widow; and from and after her death or future marriage, on trust to sell the same, and divide the produce between *Henry Barker* and *J. Barker*, his sons. He appointed *Roberts* and *Shirven* executors of his will. *Shirven* died before 29th *September* 1823.

By indenture of lease of that date, between *J. Roberts*, therein described as surviving executor of *William Barker*, *Sarah Barker*, lessor of the plaintiff, therein described as widow of the said *William*

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*Barker*, and *H. Barker*, devisee and residuary legatee named in the last will of the said *W. Barker*, of the first part, and *J. Goldsmith*, the defendant, of the other part, reciting an assignment in *August*, 1816, from *Hartwell* to the testator *W. Barker*, of a lease of the above premises to *Hartwell*, dated *November* 1807, for fifty-two years, and also the above-mentioned dispositions in the will of *Wm. Barker* deceased, they the said *J. Roberts*, *Sarah Barker*, and *Henry Barker*, demised to the defendant. Reddendum to the two latter and the survivor of them, and the executors of such survivor, in case of non-payment of rent; proviso for re-entry by *J. Roberts*, *Sarah Barker*, and *Henry Barker*, and the survivor of them, and the executor of the survivor, in case of non-payment of rent. The present ejectment was brought for a forfeiture by breach of the above proviso after the death of *Roberts* the surviving executor, the single demise laid being that of *Sarah Barker*. Verdict for the lessor of the plaintiff, with leave to move to enter a nonsuit, on the ground that she was a stranger to the legal estate, and that therefore a right of re-entry could not be reserved to her; *Doe* d. *Barber* v. *Lawrence* (*a*), *Doe* d. *Barney* v. *Adams* (*b*). A rule having been obtained accordingly,

*Hoggins* showed cause. First, the property bequeathed being leasehold, the statute of uses does not apply (*c*). The trustees having joined in the lease with the lessor of the plaintiff, with reddendum to the latter and her son, their assent to the receipt of rents by the lessor of the plaintiff appears by the lease, and an assignment by them to her must be presumed. Then this question arising on a will, the intention of the testator must rule (*d*); that is shown by the bequest of the premises

(*a*) 4 Taunt. 23. (*b*) *Ante*, 289. (*c*) 2 Bla. C. 336.

(*d*) *Harton* v. *Harton*, 7 T. R. 652, as explained *Doe* d. *Leicester* v.

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to trustees, in the words "on trust to permit and suffer (the lessor of the plaintiff) to receive the rents" during her life or widowhood; which words vested in her an estate for life (*b*), defeasible by her second marriage. Then the legal estate is in the lessor of the plaintiff, and a power of re-entry might be reserved to her; so that *Doe* v. *Lawrence* does not apply.

Secondly, the intention of the parties to the lease was, that the lessor of the plaintiff should receive the rents and profits, and should re-enter on their non-payment. The lease operates in a two-fold way;—first, as an assignment from the executor to the lessor of the plaintiff for her life; and 2dly, as a lease from her to the defendant during her widowhood. In *Burton* v. *Barclay* (*c*), a deed was allowed to have the double operation of passing a fee, and also a chattel interest, in order to carry the intent of the parties into effect.

[*Bayley* B. The devise of a leasehold to the trustee, vests the legal estate in the trustee. *Comyns*, in his *Digest*, tit. *Devise* (I) says, "a devise to *B.* to the use of another is good to the cestui qui use;" and in tit. *Uses* (C) that a man may raise uses by will, for he may devise lands to the use of another (*d*); but he there speaks of interests of immediate freehold.]

*Humfrey* contra. The argument raised from the

——, 2 Taunt. 111, and 109; 2 Wms. Saund. 11 *d.* note; *Broughton* v. *Langley*, 1 Lutw. 814, 823; 2 Ld. Raym. 873; 2 Salk. 679, S. C. Com. Dig. Uses (D. 1), and note 107; Silvester d. Law v. Wilson, 2 T. R. 444; *Doe* v. *Simpson*, 5 East, 162.

(*b*) See Dyer, 369, *a*; 2 Inst. 671; 1 Andr. 294; 2 Jones, 217—232; cited 2 Saund. 11 *d.* note.

(*c*) 7 Bing. 760.

(*d*) Citing 1 Leonard, 254, for both points, and see id. tit. Uses (D. 1), 1 Cruise, 361, 3d edit.

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assent of the trustees to the receipt of rent by Mrs. *Barker*, might have been equally applied to support the demise by *Barber* in *Doe* v. *Lawrence*. The will shows Mrs. *Barker's* interest to be equitable only, and it is admitted that a power of re-entry cannot be reserved to a stranger to the legal estate; but if her estate is sufficient to support such a power, so will that of her son *Henry Barker*, though it only arises on her death or second marriage. The defendant, by executing the lease, is not estopped from showing that upon the face of the lease executed by Mrs. *Barker* to him, she shows herself to have no title.

Bayley B.—(*a*) Had this been a lease from these three parties in their own names simply, without disclosing on the face of it the rights they individually possessed, I should have thought that a demise by *Sarah Barker*, being the surviving lessor, might have been sustained, because the lessee would, in that case, have been estopped from saying she was not a lessor. Unfortunately, this lease *does* disclose what the title of the lessor is, describing *Roberts* as surviving executor of *W. Barker*, and *Sarah Barker* as his widow, and after stating what the will is with reference to the property in question, describing it to be leasehold for the residue of fifty-two years. Then, as *Roberts* was the surviving executor, in whom alone was vested the legal interest, it is his lease only in law, though in terms the lease of *Sarah Barker*, for it operates only as confirmation by her. (*b*) Here the power of re-entry being reserved to the parties having the legal estate, and to the party having the equitable interest also, the latter has survived: but this declaration contains no demise by the representative of the former, if indeed, considering

(*a*) Lord *Lyndhurst* was sitting in equity.

(*b*) *Doe* d. *Barney* v. *Adams*, ante, 289.

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the strictness with which these clauses are construed, the representative of the surviving trustee could bring ejectment for a forfeiture.

The devise is to the executors, on trust to permit the lessor of the plaintiff to receive the rents of this leasehold for her life or widowhood, and its effect at law was to vest the legal estate in *Roberts* and *Shirvem*, and in the personal representative of the survivor of them, and to give Mrs. *Barber* an equitable right only during her life or widowhood. It would be contrary to the trust given to the executors that they, or either of them, should convey to her the legal estate. An assignment is a species of conveyance which is not to be presumed, and is not within the contemplation of the parties. This lease operates at common law; for the statute of uses applies to freeholds only, and does not comprehend copyholds and leaseholds (*a*). Then as under the statute of uses by a devise of freehold to *A.* for the use of *B.*, *B.* takes the legal estate, and *A.* is the conduit pipe merely; so at common law, if a leasehold or copyhold is bequeathed to *A.* to the use of *B.* the legal interest is in *A.* and not in *B.* Therefore in this case it appears on the face of the lease in question that the legal estate was in *J. Roberts*, and in him only, so that on his death it devolved to his personal representative, he having survived the other trustee.

There may be purposes for which a testator might wish the legal interest to remain in the trustees in order to controul *Sarah Barker's* occupation, though he might intend her to have the beneficial interest, but here there is no evidence of his intention to give *Sarah B.* his life estate. Then if so, the lease operates as a lease by him and a confirmation by the others. Then *Doe* v. *Lawrence* (*b*) is in point, that a stranger to the

(*a*) See the reasons and cases collected, Cruise, 3d ed. 361.

(*b*) 4 Taunt. 23.

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legal interest, whose real title is disclosed on the lease cannot re-enter under a power to that effect. Words creating a forfeiture have a strict construction. I am therefore of opinion that as no demise is laid by the personal representatives of the surviving trustee, ejectment will not lie, and the rule for a nonsuit must be made absolute.

BOLLAND and GURNEY Bs. concurred.

Rule absolute.

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## JOHNSON *against* POPPLEWELL.

A declaration in assumpsit in a country cause, was delivered after post hour on a *Saturday* night. A plea in abatement was afterwards delivered within the time fixed by the practice, stating that the promises, if any such were made, were made by the defendant jointly with one *J. W.* The affidavit verifying the plea had been sworn several days before the declaration was delivered, in order to prevent the loss of a plea in abatement. Interlocutory judgment having been signed as for want of a plea, the court held it regular, but, under the circumstances attending the delivery of the declaration, set it aside on payment of costs and affidavit of merits.

*Semble*, that the defendant's proper course would have been to have applied for further time to plead in abatement.

Affidavit of merits is sufficient, if sworn by the agent of the country attorney on information and belief, if the facts are uncontradicted.

ASSUMPSIT for demurrage occurring on an inland navigation in *Yorkshire*. The defendant's attorney lived at *Barnsley*, in that county, one hundred and seventy-six miles from *London*. On *Saturday* the 28th *April*, the declaration was delivered to his *London* agent at night, after the post hour. On 1st *May* a plea in abatement was delivered, stating that the said promises and undertakings in the said bill mentioned, if any such were made, were made by the said defendant jointly with one *J. W.* not named in the bill. The defendant's affidavit of the truth of the plea was sworn on the 17th *April*, the day after the plaintiff appeared by the declaration to have come into court. The affidavit of the agent to the defendant's attorney

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stated, that he being aware of the practice of depriving defendants of pleas in abatement by filing or delivering declarations in country causes after the post hour on *Saturdays*, caused the plea to be prepared to the bill, with the affidavit made and sworn as above, before the declaration was delivered; and that he was informed and verily believed it to be true, that the defendant had a good defence to the action on the merits. Interlocutory judgment being signed for want of a plea,

*Starkie* on the 8th *May* obtained a rule for setting it aside for irregularity with costs, or, for setting it aside, if regular, on payment of costs by the defendant.

*Blackburne* showed cause. First, *Westerdale* v. *Kemp* (*a*) is in point. It decides that an affidavit of the truth of a plea in abatement sworn several days before the delivery of the declaration, to the promises in which the plea applies, will not support that plea. Secondly, the affidavit of merits is irregular, not being sworn by the defendant, his attorney, or the managing clerk of the latter, but by the *London* agent, who swears to information and belief, without stating from what source obtained, *Neeson* v. *Whytock* (*b*).

*Starkie* in support of the rule. By 4 & 5 *Ann.* c. 16. s. 11. an affidavit is made necessary to prove the truth of a dilatory plea, or to show some probable matter to the court to induce them to believe that such plea is true. Now the defendant might in truth have had good ground for believing that what he swore accorded with the truth, *e. g.* from knowing on what promises alone he could be sued by the plaintiff, and that he was only liable for them jointly with another party. On that view the court in *Lang* v. *Comber* (*c*), sup-

(*a*) *Ante*, Vol. I., 260. (*b*) 3 Taunt. 403. (*c*) 4 East, 348.

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ported a plea in abatement, though the affidavit verifying it was sworn at *Liverpool* the day the declaration to which it was pleaded was filed in *London*. If that case is not adhered to, defendants residing at a distance from *London* will lose the advantage of pleas in abatement. The affidavit of merits is sufficient: for though the rule was enlarged to this term, the plaintiff has not sworn that no merits exist, or that the debt is due from the defendant only.

BAYLEY B.—Upon principle and common sense I think this affidavit is bad: for the plea which it assumes to verify is pleaded to promises as contained in an instrument which did not exist at the time the affidavit was sworn: but the authorities are conflicting. Assuming this affidavit to be entirely false, an indictment for perjury could not be framed; for it must state that there was a bill, and that the promises alleged applied to it; now as no such bill existed at the time the affidavit was sworn, such an indictment could not be supported. But *Long* v. *Comber* affords a precedent for the court to enlarge the time for putting in a plea in abatement on a proper affidavit; as for instance, that the defendant never undertook and promised any thing to the plaintiff except jointly with *J. W.* not sued, and that the distance would otherwise prevent the pleading in abatement by the defendant within the four days after the delivery of the declaration; both days being reckoned inclusive by the practice of the courts (*a*). Such an application might in this case have been made on the *Monday* following the delivery of the declaration. But this judgment has been regularly signed (*b*), and the plaintiff was justified in treating the plea as a nullity,

(*a*) See *Richards* v. *Setree*, 3 Price 197; and Tidd, 9th ed. 565, note.

(*b*) *Harbord* v. *Perigal*, 5 T. R. 210; *Jennings* v. *Webb*, 1 T. R. 277 and 278.

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for want of the affidavit, as required by the statute. For no *bill* here existed on the day it was sworn; but in *Lang* v. *Comber* the *declaration*, to the promises in which the plea was directed, existed on that day, though at too great a distance to presume that the defendant could have seen it.

But under the circumstances of contrivance in delivering the declaration, the affidavit of the agent, on information and belief, is sufficient to let in the defendant to have relief on payment of costs.

VAUGHAN B.—There is a material distinction between this case and that of *Lang* v. *Comber*; for in this case no bill existed at the time the affidavit in support of the plea in abatement was made; whereas in that case the *declaration* to which the plea was directed, did exist on the day the affidavit was made.

BOLLAND B.—If this affidavit could have been prospectively made, it might then have been made before any action subsisted, so that the country commissioners, before whom it was sworn, would have had no authority to administer an oath, and no indictment for perjury could be sustained (*b*).

Rule absolute to set aside the judgment, on payment of costs and affidavit of merits.

(*b*) See 3 Inst. 166; 29 Car. 2. c. 5; 7 T. R. 661; 3 Pri. R. 201; 1 Chit. R. 727.

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## DOE, demise of KNOCKER, *against* RAVELL and Others.

EJECTMENT. At the trial before *Tindal* C. J. at the last *Kent* assizes, a verdict was found for the lessor of the plaintiff, subject to the opinion of the court on the following case:—

*Margaret Ravell* being seised in fee of several messuages at *Postling*, made her last will and testament in writing, dated the 6th *June* 1780, duly executed for passing real estates, whereby, after directing the particulars of her burial, she gave and devised as follows:—"And as for such temporal estate as God hath given me, I give, devise and dispose of it in the following manner. First, I give and bequeath to *John Ravell*, the younger, (to come into his possession as soon as he arrives at the age of eighteen years,) all that messuage or dwelling-house, together with the garden, backside and appurtenances thereunto belonging, as also the right of commonage for and cow lees on *Postling Lees*, which said premises are situate in *Postling* aforesaid, and are now in the tenure or occupation of *John Chaplin*, or his assignees. All which said premises I do hereby give *John Ravell*, the younger.

"Item, I also give and bequeath to my nephew, *John Ravell*, the elder, the sum of 25*l.* of principal money, and all interest due thereon at my decease; which said sum of 25*l.* is a moiety of 50*l.* now in the hands of my trusty friend, Mr. *Fremoult*, of *Canterbury*; the other moiety whereof being the property of my late sister, and was by her given to my said nephew, *John Ravell*, the elder.

"Item, I give and bequeath to my faithful and much-esteemed friend, *Sarah Russell*, widow, (now residing with me in my dwelling-house, in the parish of *Postling*,)

The preamble of a will "as for such temporal estate as God has given me, I give, devise and dispose of *it*," was followed by words of devise of real property to *A. B.*, without words of inheritance, and a residuary clause confined by the will itself to personalty only:—Held, that the preamble alone could not operate to pass a fee to *A. B.*

The will devised real property to *C. D.* without words of inheritance, and if he died before the age of eighteen, then declared that it should descend and go to *A. B.* Held, that the devise over raised no presumption that the fee was intended to pass to *A. B.*, who was not the heir at law.

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all that my messuage or tenement wherein I now live and dwell, together with the stable, out-houses, garden, backside and appurtenances thereunto belonging; as also the right of commonage for and cow lees on *Postling Lees*.

"Item, I do also give and bequeath to the said *Sarah Russell*, widow, one like messuage or tenement, with the garden, backside and appurtenances thereunto belonging, now in the occupation of the widow *Graves* and the widow *Turrall*; which said premises are all situated, lying and being in the parish of *Postling*, in the county of *Kent*.

"I do also give and bequeath to the aforesaid *Sarah Russell*, widow, her executors and administrators, all the rest, residue and remainder of my estate and my estates whatsoever and wheresoever, (that is to say) my ready money and wearing apparel, and all the interest-money that shall be due to me at the time of my decease; as also my household goods, fixtures and furniture, and the remainder of my goods and chattels of what nature and kind soever; she, from the produce thereof, first paying and discharging all my just debts, funeral expenses, and the expense and charge of proving this my will in court. I do also hereby appoint the said *Sarah Russell*, widow, trustee to *John Ravell*, jun. that is, I order that she shall hold the house and premises I have before left to *John Ravell*, jun. and receive the rents till he is eighteen years of age, for her own use, without being accountable to any one for so doing. I do hereby give *Sarah Russell* the rent of *John Chaplain's* house and premises for her own use till the said *John Ravell*, jun. is eighteen years old; and if he dies before that time, then all that I have left him shall descend and go to *Sarah Russell*, widow; and I do hereby appoint and nominate her the said *Sarah Russell*, widow, to be sole executrix of this my

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last will and testament, and do revoke all former ones before made, solemnly declaring this and this only to be my last will and testament. In witness whereof I have hereunto set my hand and seal, this 6th day of June, in the year of our Lord 1780.

"MARGARET RAVELL."

The testatrix died in the same year, seised of the several premises mentioned in the said will.

Mrs. *Sarah Russell*, the devisee, soon afterwards entered into possession of the two messuages so devised to her, and lived in one of them and let the other. She continued in such possession and in receipt of the rent of the other messuage until her death, which happened in the year 1822. She left two sons, *Thomas* and *William Russell*, co-heirs in gavelkind, and they entered and took possession of the messuages and received the rents thereof. *William Russell* died in 1823, leaving two sons and co-heirs at law, who, after their father's death, viz. on the 2d *July*, 1824, executed a conveyance, whereby they assumed to convey a moiety of the said messuages to *Thomas Russell*, who, on the fifth of the same month, mortgaged the said messuages to the lessor of the plaintiff for securing a sum of 97*l*. *Thomas Russell* continued to receive the rents of the messuages from the death of his mother until the defendant, *John Ravell*, claiming title to the same as heir at law to the testatrix, *Margaret Ravell*, in the year 1829, took adverse possession. The question for the opinion of the Court is, what estate the said *Sarah Russell* took under the will of the testatrix. If the Court shall be of opinion that she took an estate in fee, the verdict (taken at the trial for the lessor of the plaintiff) is to stand. If of a contrary opinion, the verdict is to be set aside, and a nonsuit entered.

*Comyn*, for the lessor of the plaintiff. *Sarah Russell*,

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took an estate in fee in the two messuages devised to her. The intent of the testator, if discoverable, must prevail, *Doe* v. *Bucknell* (*a*). So in *Wilce* v. *Wilce* (*b*), the testator's intent is said to be the polar star in the construction of a will. Now the introductory part of this will shows the clear intention of this testatrix to have been to dispose of the whole of her property, and is connected with the devise (*c*). "As for such temporal estate as God has given me, I give, devise and dispose of it," viz. the whole. In *Wilce* v. *Wilce*, the words were, "as touching such worldly property wherewith it has pleased God to bless me in this world, I give, devise and dispose of the same in the following manner and form." Upon these words, *Tindal* C. J. says, "Nothing can be more comprehensive than these words. No one can doubt that testator meditated disposing of all he had in the world. The question is, whether looking at the body of the will we can see that he has carried that intention into effect." Now this testatrix distinguishes between her real and personal property; she first gives land and premises to *John Ravell*, and then by the residuary clause gives the rest of her estate, which the words of the will show to be the personalty only, to *Sarah Russell*; thus showing her clear understanding that she had nothing but personalty to dispose of, and that she had, by previous disposition, effectually given an absolute interest in all her realty. The words of devise to *John Ravell* show the testatrix's intention to pass the absolute remainder in fee to *Sarah Russell* in the contingency of his death occurring, *Purefoy* v. *Rogers* (*d*).

*Platt*, for the defendant, was stopped by the Court.

(*a*) 6 T. R. 612. (*b*) 7 Bing. 664.
(*c*) See Lord *Mansfield's* judgment in *Denn* v. *Gaskin*, Cowp. 660.
(*d*) 2 Saund. 380, 388.

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Lord LYNDHURST C. B.—In this case *Sarah Russell* has the right to receive the rents of property devised to *John Ravell* during his life only, and as she is not the heir at law, the devise over to her does not create any presumption in favour of the fee passing as contended. Many cases show that the introductory words in the preamble of a will will not overrule its special words of disposition, though they may assist the Court in construing them. In this case, as to her "temporal estate," the testatrix gives it; then what did she regard as the remainder to be disposed of by the residuary clause of her will? The enumeration in that clause shows that it only applied to her personalty. Then though the wording of the preamble may be equivalent to that in *Wilce* v. *Wilce* (*a*), we cannot act upon that alone.

BAYLEY B.—I am of the same opinion. In *Wilce* v. *Wilce*, the residuary clause contained the words "and every thing else I die possessed of," *viz.* every thing else not before disposed of by the will. Those words standing by themselves would have passed real property, *Hurtep* v. *Broomam* (*b*), but there are no such words in this will.

The other barons concurred.

Judgment for defendant.

(*a*) 7 Bing. 664; and see *Doe* v. *Wright*, 8 T. R. 64; *Doe* v. *Allen*, id. 497; *Doe* v. *Gilbert*, 3 Br. & B. 85; *Bradfield* v. *Belford*, 2 Sim. 264.

(*b*) 1 Bro. Ch. Cas. 437.

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## Doe *against* Roe.

If the notice to appear in ejectment is served in one term, judgment may be moved for against the casual ejector in the next term, being issuable.

THE notice to appear in ejectment was of last *Easter* term, and regularly served with the declaration in that term.

*John Jervis* contended that the lessor of the plaintiff might move for judgment against the casual ejector in this, being an issuable term, on the ground that regular service is notice to the party to watch for judgment.

*The Court* assented, declaring the course stated to be the usual practice.

## Doe *against* Roe.

One rule for judgment against the casual ejector, though several tenants in possession had been served with ejectment.

*LUMLEY* moved for one rule for judgment against the casual ejector, though there were two tenants in possession, on each of whom copies of the declaration in ejectment had been served.

*Per curiam.* — One rule is sufficient where there is but one ejectment. Service on one person, being a joint tenant with two others, is good as to all.

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GROJEAN *against* MANNING.

A RULE had been obtained by *Cunningham* for setting aside a verdict and other proceedings for insufficiency of notice of continuance of trial of a town cause from one sittings to another, served at eight o'clock on *Saturday* night, the 28th of *April*, for the following sittings, *viz.* for 7th *May*, in *London*. The cause stood for trial, &c. on *Monday*, 30th *May*.

Two clear days' notice of trial must be given exclusive of an intervening Sunday.

*Busby* showed cause. It is said that one day being *Sunday*, the notice is not sufficient; but where bail are sued on their recognizance, *Sunday* is counted as one of the eight days allowed them to render, and so in many other similar cases.

[Lord *Lyndhurst*. Two clear days' notice must be given. The party is intended to have two clear days to transact business in in consequence of the notice served on him, now *Sunday* is no day for the purposes of business. *Bayley* B. He has, in fact, only thirteen hours notice, and has not time to send back his witnesses before the *Monday*. Notice of bail on *Saturday* would not ground justification on *Monday*.] Had this been notice of countermand, *Sunday* would have been reckoned as one of the days. [*Bayley* B. The new general rule, that for computation of days in a rule, lays down that the first day is to be excluded, the last included, but nothing is provided as to intervening days. (*a*)] The plaintiff is only liable for the costs of the day incurred on *Monday* 30th *May*, the notice being good for 7th *May*, and merits being sworn to.

(*a*) See *Reg. Gen. Hil.* 2 *W.* 4. No. 8, Tidd, 9th edit, 757, 758.

1832.

GROJEAN v. MANNING.

The defendant attended the Court on the 7th of *May*, with his attorney, and instructed counsel.

*Per curiam*—We can neither know nor have any thing to do with what passes between attorney and client. A brief might be given by the defendant to watch the plaintiff's proceedings. The defendant did not appear, might be aware of the irregularity, and that the plaintiff went on at his peril.

Rule absolute with costs, as moved.

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## TRAVIS *against* COLLINS.

Where two parts of an agreement by a tenant with her landlord to keep premises in repair had existed, mutually signed by both parties, of which the reversioner had one: Held, that his assignee suing for breach of the agreement could not compel the tenant to produce his copy in order to its being stamped; for he should have applied to the assignor through whom he claimed, or have shown that he could not be found.

*Semble*, that if the only part which existed had been destroyed in order to evade an order of Court for its production by the party to the cause called on to produce it, he might be attached, and a copy ordered to be stamped; but *quære*.

ACTION on agreement between one *Hatfield* and the defendant to keep a mill of the plaintiff in tenantable repair. The mill was in possession of the defendant at the time of sale. The plaintiff, as assignee, sought to recover damages for breach of that agreement, to which he was not a party. A bill of discovery had been filed in Chancery by the plaintiff to enforce the re-building, in the defendant's answer to which, the existence of the agreement being admitted, a copy of it was set out.

*Cowling* moved for a rule to show cause why the defendant should not produce the agreement at the stamp office, in order to its being stamped, and produce it stamped at the trial, and give the plaintiff a copy.

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BAYLEY B. (a)—The general rule is, that if there is originally only one part of an agreement, or if there are two parts of it, both of which have got into the possession of the same person, the opposite party has a right to have inspection of it, as it then becomes the common property of both parties. But here is no evidence whether there were originally two parts or one only. If there were originally two parts, the plaintiff had no right to a copy. We might do injustice in putting the plaintiff in possession of the agreement without the accompanying answer in Chancery. The plaintiff wishes to prove the agreement there set out without reading the answer.

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VAUGHAN B.—The defendant does not hold as trustee within those cases where each party has an interest in the document. If the original is lost, and the defendant's copy is not produced to be stamped on notice of the rule, you may give secondary evidence of it.

Rule granted to show cause why the defendant should not produce the agreement at the stamp office in order to be stamped.

*Wightman* showed cause. Assuming that there were originally two parts of the agreement, the defendant could not be called on for his. [Lord *Lyndhurst* C. B. All that is required is not to fail at the trial for want of complying with the fiscal regulation of stamping, which they want to do at their own expense.] The other part of the agreement is or ought to be in the custody of *Hatfield*, from whom the plaintiff took the premises. The plaintiff is not a party to this agreement. *Law-*

(a) Lord *Lyndhurst* was sitting in equity.

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rence v. *Hooper* (a), was a motion by the plaintiff calling on the defendant to produce an agreement entered into by him with one *Jee*. It did not there appear that more than one part of the agreement existed, and *Jee* swore that the plaintiff's claim arose out of it; but the court refused to interfere with the rights or liabilities of a third person. He cited *Street* v. *Brown* (b). [Lord *Lyndhurst* C. B. That was not a motion for the purpose of stamping an instrument, but for inspection of it only and taking a copy.] In *Brown* v. *Rose* (c), the plaintiff in replevin was refused even the inspection of a deed to which he was no party, assigning to avowant the reversion of the demised premises. The copy of the agreement now wanted to be stamped was destroyed after it was returned from the court of chancery.

*Cowling* supported the rule, and cited *Bousfield* v. *Godefroy* (d), as to the destruction of the defendant's copy of the agreement. In that case the defendant, after surreptitiously obtaining possession of an unstamped agreement executed by himself and the plaintiff, and thereby preventing the plaintiff from affixing a stamp as he intended in twenty-one days after execution, swore he had lost the agreement. The court ordered a copy in his possession to be produced to the plaintiff, and that if that copy was produced at the trial stamped, the defendant should be precluded from producing the original. He prayed a reference to the master to ascertain when the agreement was destroyed, and if found to be purposely destroyed, then for a rule to shew cause why secondary evidence of it should not be given without notice to produce the original.

(a) 5 Bing. 6.
(b) 6 Taunt. 301.
(c) 6 Taunt. 283.
(d) 5 Bing. 418.

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TRAVIS v. COLLINS.

Lord LYNDHURST C. B.—How can that leave be given if the original copy in existence never had been stamped? The tender of a bill of exceptions for admitting any other part in evidence could not be prevented by the rule now prayed for. The prayer of the rule is answered by the fact that the copy sought to be stamped is not in existence. The plaintiff's own copy might be stamped if that is of any use.

Rule discharged.

*Cowling* afterwards moved for leave to stamp a copy, and that the defendant might be precluded from producing the original at the trial, or from objecting to the want of any stamp thereon, or why an attachment should not issue against the defendant for the destruction of the said agreement, if it should appear to have been destroyed after the rule to produce it was obtained. The first summons was before *Bolland* B. on 26th *January* 1832, was discharged, but afterwards renewed on 18th *February*; after several attendances an order was made, and recalled on the 24th *February*. A rule was refused as to the first part, but granted for the attachment as prayed.

*Wightman* showed cause on affidavits that the defendant's copy of the agreement was destroyed *before* the making and recalling the order of 24th *February*; and on an affidavit that two originals of the agreement had existed mutually signed by the parties, and that the defendant believed one to be in *Hatfield's* possession. The plaintiff should call on him as his assignor to produce that copy in order to its being stamped. It is only where but one copy is extant that the defendant can be compelled to give evidence against himself. If in this case *Hatfield*, the party to the agreement, could not have compelled the defendant to produce his copy

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in order to stamping, then how can the plaintiff, his assignee, so compel him?

*Cowling*, in support of rule.—The defendant does not swear he destroyed his copy before notice of the first application, or that he did not destroy it in order to defeat the action, but that he destroyed it before the making and recalling of the baron's order on 24th *February*. The existence of a second copy in *Hatfield's* hands is now sworn to for the first time; though he cannot be found by the plaintiff, he may be called by the defendant at the trial to nonsuit the plaintiff, by proof that he has another copy. The plaintiff may then be obliged to read the defendant's answer.

BAYLEY, B. (*a*).—The facts now appearing on the affidavits are these—There were originally two parts of the agreement, one of which is now sworn to be in *Hatfield's* possession, through whom the plaintiff claims and from whom he purchased. His would be the proper custody for that document. In *Bousfield* v. *Godefroy* only one part of the agreement existed. In the present case, if only one part had existed, it would have been a matter of course that the party to the cause who possessed it should attend at the stamp office, and had it been found that he had destroyed the instrument, for the purpose of evading the objects of the court in compelling such attendance, the court, under such circumstances, might have ordered a copy to be stamped; though even after *Bousfield* v. *Godefroy*, it would be very doubtful whether such stamping would have made the copy stamped evidence, but we might have so moulded the rule as to make it practicable to try that question (*b*). The rule, however, is, that

(*a*) Lord *Lyndhurst* was in equity.

(*b*) See *Gully* and others v. *Bishop of Exeter* and another, 10 B. & Cr. 584.

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where there are two parts of an instrument, no application of this kind should be made to the court. It was very desirable that *Hatfield* should have one part in his possession that he might know on what terms he was holding; and in the ordinary course of things, he, when parting with the property, should have passed the benefit of that agreement to the plaintiff as purchaser, it being now sworn positively that a second part existed, which was in *Hatfield's* possession. Then the ordinary rule applies, and there is no ground for a rule of this court to produce the defendant's copy to be stamped. The court has not been satisfied by any affidavit that every possible attempt had been made to find *Hatfield* and get the agreement from him. This rule must be discharged, but as this suggestion of the original existence of two parts was not made till now, it will be discharged without costs.

VAUGHAN B.—The cases carry the indulgence prayed by this rule no further than where there is only one part of the agreement. In *Bousfield* v. *Godefroy* there was only one part, which had been surreptitiously obtained by the defendant. It is not necessary to decide here whether the court of Common Pleas went too far in saying a copy should be admitted in evidence. The plaintiff may postpone the trial till he has ascertained the fact from *Hatfield*.

BOLLAND B.—In the several discussions which took place at chambers before several judges, it never appeared that two parts of this agreement originally existed, or that one part had been destroyed. Those facts appeared for the first time in answer to this motion.

GURNEY B. concurred.

Rule discharged without costs. (*a*)

(*a*) See *Neale* v. *Swind*, *ante*, 318.

1838.

ANDERSON *against* BELL.

A defendant may be arrested for sums paid by plaintiff as obligor of an indemnity bond, as for liquidated damages, if the sum the plaintiff has been called on to pay can be ascertained.

*BIGGS ANDREWS* moved to discharge the defendant from custody on filing common bail. The action was on a bond of indemnity for payment of an annuity, under which bond the plaintiff alleged he had paid several years arrears ending 1821. He contended that the sum sought to be recovered was in the nature of unliquidated damages.

*Lewin* showed cause in the first instance, that the arrear of annuity paid by plaintiff *certum reddi poterit*.

**Lord LYNDHURST C. B.**—The plaintiff undertook to indemnify the defendant against the making a money payment, and against the not paying a sum certain or such a sum as the defendant ought to pay. That is sufficient certainly.

**Motion refused.**

JAMES, Gent. one &c. *against* CHILD.

Where an attorney had claims on his client for conveyancing, and also for charges at law, and received payments on account, without specific appropriation to either head of debt: Held, that the whole formed one entire demand not to be separated, and that the plaintiff could not apply the payments to the common law items of his demand only, so as to deprive the defendant of the benefit of taxation *quoad* the residue of the bill.

*Semble*, that the drawing and engrossing of a warrant of attorney is a taxable item.

ASSUMPSIT by an attorney for 52*l.* 10*s.* the amount of a bill for conveyancing charges due from the defendant to the plaintiff. At the trial before *Bolland* B. at the last assizes for *Pembrokeshire*, it

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appeared that the items of business charged for were done between 1822 and *April* 1825, and also in 1828. Previous to the latter year the plaintiff had been also employed by the defendant in carrying on and defending certain common law actions, for the costs of which he made out a separate bill amounting to 100*l.* 3*s.* 1*d.*, and applied to the defendant for payment in *September* 1828. The defendant, by letter in the *October* of that year, excused himself for not paying it, and requested the plaintiff to borrow 100*l.* for him on his, the defendant's bond. That was done, and the plaintiff having previously received 1*l.* 3*s.* 6*d.* from the defendant, credited him in account with 100*l.* more in *November* 1828. The common law items had been previously examined by the defendant and allowed by him to be correct. The conveyancing bill, though incurred, had not been at that time delivered, for the defendant had referred the plaintiff for payment of a part to the *Burgelly* Coal Company, who were afterwards ineffectually sued for it by the plaintiff at the defendant's instance. The plaintiff sought to apply the payments made to the common law bill only.

The plaintiff was nonsuited on two grounds.—1st. That no bill had been delivered to the defendant pursuant to 2 *Geo.* 2. c. 23. s. 23. one month before commencing the action, though one of the items included in the particulars of demand was for preparing and engrossing a warrrant of attorney, and therefore taxable. *Sandom* v. *Bourn* (*a*), *Weld* v. *Craufurd* (*b*), *Ex parte Prickett* (*c*). And, secondly, that the plaintiff could not so separate his taxable and untaxable claims on the defendant, as to sue for the latter without delivering a bill embracing the whole according to the last mentioned statute, *Hill* v. *Humphreys* (*d*). *Thwaites*

(*a*) 4 Camp. 68. (*b*) 2 Stark. C. N. P. 538.
(*c*) 1 New R. 266. (*d*) 2 B. & P. 343.

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*Mackerson* (*a*), *Benton* v. *Garcia* (*b*), *Watt* v. *Collins* (*c*).

In *Easter* term *John Evans* moved to set aside the nonsuit and enter a verdict for the plaintiff or for a new trial. He stated the above facts, and in answer to a question by Lord *Lyndhurst*, said, that though the sum paid in 1828 was not quite equal to the common law bill, the plaintiff had taken that sum in satisfaction of it; and that as the amount of the conveyancing bill payable by the defendant was not then ascertained, the plaintiff had a right to appropriate the payment to the other account. [Lord *Lyndhurst* C. B. Appropriation is a term which does not enure to deprive the party paying of a benefit, such as taxation would be in this instance.]

The authority of *Sandom* v. *Bourn* (*d*), was questioned by *Bayley*, J. in *Burton* v. *Chatterton* (*e*); and by *Alderson*, J. in *Smith* v. *Taylor* (*f*). In *Dagley* v. *Kentish* (*g*), *Littledale*, J. expressed doubts as to *Wilson* v. *Gatteridge* (*h*). It is not therefore settled that the drawing and ingressing a warrant of attorney is a charge at law for business done in Court so as to make the delivery of a bill necessary. *Mowbray* v. *Fleming* (*i*) and *Heming* v. *Wilton* (*k*), show that items of debt not connected with the taxable charges of an attorney may be recovered by him in an action for those charges, though he fails as to the latter, for want of delivering a bill according to the statute. A rule having been granted,

*Chilton* showed cause in this term. Whether draw-

(*a*) Moody & M. 199.
(*b*) 5 Esp. 149; Heath, J. 11 East, 287, n. S. C.
(*c*) Ry. & M. 284.
(*d*) 4 Camp. 68.
(*e*) 3 B. & Ald. 487.
(*f*) 7 Bing. 264.
(*g*) 2 Bar. & Adol. 411.
(*h*) 3 B. & Cr. 157.
(*i*) 11 East, 285.
(*k*) M. & M. 199.

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ing a warrant of attorney be a taxable item or not, the two sets of charges of the plaintiff against the defendant should have formed the subject of one bill; and if so, the plaintiff could not appropriate to the common law items the payment made generally on account in *November* 1828. But *Sandon* v. *Bourn* (*a*) and *Weld* v. *Crawford* (*b*) show, that in the opinions of Lord *Ellenborough* and Lord *Tenterden* a charge for preparing a warrant of attorney is a taxable item. In each of those cases the plaintiff was nonsuited on the ground that a bill should have been delivered according to the statute. *Wilson* v. *Gutteridge* (*c*) has the same aspect, though being a motion to refer a bill for taxation, the necessity for delivering a bill was not directly in question. *Dagley* v. *Kentish* (*d*) leaves the matter in doubt. [*Bayley* B. The point there established was, that the courts under their general inherent power over their attornies will not refer for taxation a bill which has not a taxable item (*e*).]

*Winter* v. *Payne* (*f*), and other cases, do not conclusively prove that business in order to be taxable must be done in court, though *Alderson* J. in *Smith* v. *Taylor* (*g*) describes the power of referring bills for taxation as so confined. Thus a bill for business done at quarter sessions is taxable, not as being done in a court at *Westminster*, but as brought there by an attorney of the court, in order to be enforced there by action, *Clark* v. *Donovan* (*h*); and the plaintiff was nonsuited for non-delivery of a bill pursuant to the statute. *Smith* v. *Wattleworth* (*i*) applies the same principle

(*a*) 4 Camp. 68.
(*b*) 2 Stark. C. N. P. 538.
(*c*) 3 B. & Cr. 157.
(*d*) 2 Bar. & Adol. 411.
(*e*) See *Watson* v. *Poston*, *ante*, 406.
(*f*) 6 T. R. 645.
(*g*) See 2 *Geo.* 2. c. 23. s. 23; 7 Bing. 260.
(*h*) 5 T. R. 694; 1 Esp. 137. See *Ex parte Williams*, 4 T. R. 496; *Luxmore* v. *Lethbridge*, 5 B. & Ald. 398.
(*i*) 4 B. & Cr. 364.

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to business done in an insolvent court. [*Bayley* B. The words of the statute apply in those cases, the sums to be recovered being fees chargeable as business "at law."] Secondly, the plaintiff on receiving the 100*l.* was not entitled to split his entire demand into two accounts, the one taxable the other not(*a*), and could not, therefore appropriate the 100*l.* to particular items in *the single account which should have been delivered*. The whole business, taxable and other, done by the plaintiff for the defendant, was done before the 100*l.* was credited to the defendant, except an item of 5*l.* 14*s.* charged for raising that sum.

[*Bayley* B.—That being the fact, if the plaintiff's whole demand is to be considered as one entire bill, the 101*l.* must be taken to have been paid generally on account, and cannot be appropriated to taxable items only. For if the plaintiff has one entire demand, the whole of which is taxable, the right to tax it cannot be taken away by one payment on account. It is a general rule that the application of a payment in a given way cannot be allowed if it operates to the disadvantage of the party paying.]

*Evans* and *Whitcombe* in support of the rule. The items of the common law charges having been allowed by the defendant to be correct on 12 *November* 1828, before the plaintiff credited the defendant with 100*l.* in satisfaction of those claims on him, the plaintiff's claim for those charges ceased from that day, and that sum must be taken to have been appropriated to their discharge as well by the defendant as the plaintiff. If so, a debt did not exist after that period for common law charges, as was contended. That account was necessarily separated from the conveyancing bill, for at the time of the settlement in 1828, the defendant

(*a*) See *ante*, notes in pp. 733, 734.

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referred the plaintiff to other persons for payment of part of the latter amount, nor was this action commenced against the defendant for it, till long after these persons had defeated the plaintiff's claim against them.

[*Bayley* B. In the plaintiff's account of his demand delivered to the court since the rule obtained, he makes an abatement of the item of 5*l.* 11*s.*, charged for raising the 100*l.*, and therefore untaxable, in order to include in its place in the settlement of 1828 some taxable items of 6*l.* 10*s.* due from the defendant to the plaintiff at that time for common law charges on another account. But no such abatement was previously made; so that unless it can be shown that the 6*l.* 10*s.* was discharged in *November* 1828, taxable items remained undischarged after the settlement then made.]

If a part of the plaintiff's taxable charges remained due to him after he credited the 100*l.* to the defendant, his taking less than his demand on that account will not preclude him from suing for his conveyancing bill; for the common law bill, though paid, may yet be taxed if it contains fraudulent items (*a*). It should have been left to the jury to say, whether or not the 100*l.* paid in *November* 1828, was intended to satisfy the bill delivered to and approved by the defendant, or the bill for a less sum sued for in this action.

BAYLEY B. (*b*). This rule was properly granted in order to the discussion which has taken place; but I am of opinion that the nonsuit was right. In general if an attorney does, as such, business of different descriptions, one part of it being, per se, taxable, and the other not, the whole becomes one entire demand, and as such subject to taxation. For while such demands exist between the parties, they cannot be

(*a*) See the cases collected, Tidd, 9th ed. 332; and *Glascott* v. *Castle*, *ante*, 302.

(*b*) Lord *Lyndhurst* was sitting in equity.

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split, so as by making them out separately, to avoid taxation of the whole in respect of particular items liable to it by law. It may happen that if a party, knowing all the circumstances under which taxation may or may not take place, should by a distinct agreement suffer a bill due from him to an attorney for common law charges to be made up separately from one due to him for conveyancing, and should agree to pay the common law bill, and not to have the conveyancing bill taxed, that agreement might prevail; but there are no facts here to warrant the conclusion that any such agreement took place in the present case. On the other hand, charges for proceedings at law by the defendant have always existed in this case. The whole claim of the plaintiff on the defendant amounted to 164*l.* 14*s.* including 6*l.* 10*s.* due for taxable items, and 5*l.* 11*s.* for conveyancing charges. When the payment of 100*l.* was made, the defendant had a right to consider the residue which was not paid as standing in the same situation with that which had been so previously discharged. The original amount of the common law bill examined by the defendant was 100*l.* 3*s.* 1*d.*; that bill is imperfect on the face of it, for it states at the end that some further items are to be introduced into it when the plaintiff could get his agent's charges. Those charges do not appear ever to have been introduced; 1*l.* and a fraction had been paid, and 100*l.* was afterwards credited as paid. Now if it was paid without specific appropriation by the defendant at the time (and of such appropriation I see no evidence) I am of opinion that the residue due would be taxable, and that the payments made should be applied to so much as on taxation would appear to be due. 5*l.* 11*s.* for a charge not taxable, and 6*l.* 10*s.* for common law charges and taxable, continue due; then does that continuance keep this as a taxable bill? There is no evidence that

either was discharged in 1828; for the plaintiff for the first time abates in the account of his demand recently delivered to the court, the item not taxable, in order to treat the payment of the 100*l.* in 1828 as a settlement and discharge of the item of 6*l.* 10*s.*, and the rest of his common law bill. But no fact proved points at any such previous abatement by him. Therefore as the item of 6*l.* 10*s.* continued an existing charge for business done at law, and was taxable, a bill ought to have been delivered a month before this action was brought. The consequence is, that this rule must be discharged.

BOLLAND B.—I have never altered my opinion that the nonsuit in this case was right. There is no evidence to support the argument that the sums paid were appropriated to the payment of the common law bill, or that the plaintiff's whole demand on that account was intended to be satisfied by that payment. It was a payment made under pressure by the plaintiff, for an account allowed to be imperfect; for it states the agency charges to be not yet procured; and they, as well as the taxable items amounting to 6*l.* 10*s.*, remain yet unpaid.

GURNEY B.—The plaintiff brings this action for his bill, which is said not to be subject to taxation; but as, at the time of the settlement between the parties, 6*l.* 10*s.* remained due from the defendant to the plaintiff for taxable items, and it does not appear that any abatement of the 5*l.* 11*s.* for untaxable items was really made by the plaintiff at an earlier period than that pointed out by my brother *Bayley*, taxable items remained in this account at the time of bringing the action.

Rule discharged.

1832.

## HARRISON *against* BENNETT.

Where a first trial became fruitless by the absconding of a juror before an effectual verdict was returned, and the plaintiff obtained a verdict on a second trial: Held, that the defendant must pay the costs of the first trial.

AT the trial of this cause before *Bolland* B. at the summer assizes at *Chester* 1831, the jury, after retiring, returned and gave a verdict for the plaintiff "with no damages." On being directed to reconsider their verdict, they retired again, and in the course of so doing, one of them absconded and could not be afterwards found. The other jurors were discharged, as the plaintiff would not consent to the defendant's offer to take the verdict of the eleven. The cause was again tried at the spring assizes 1832, and the plaintiff had a verdict. The master having doubted whether he could allow the costs of the first trial, *Lloyd* moved for a rule to review the taxation; and

*J. Jervis* showed cause, contending that as neither party was in fault, the costs should be borne equally between them. He said that had been the course taken on the first trial of *Rowe* v. *Brenton*, which had miscarried in consequence of the illness of a juror.

*Lloyd* contrà. The verdict for the plaintiff on the second trial showed that the plaintiff had a just demand; by the defendant's resistance to which, the trial became necessary. Then the defendant must pay the costs of the first trial. Where a case is made a *remanet* without the fault of either party, the costs of the first assizes or sittings abide the event (*a*). In *Rowe* v. *Brenton* the master's decision was not called in question before the court.

*Cur. adv. vult.*

(*a*) See Tidd's Prac. 758, 9th ed.

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HARRISON v. BENNETT.

Lord LYNDHURST C. B. afterwards said:—The absconding of the juror was one of the incidents in the cause, and the plaintiff was not bound to take the verdict of eleven jurors. Then as the finding of the second jury shows that the defendant, by resisting the demand of the plaintiff, was the cause of the litigation, he must be answerable for the consequences, and pay the costs of the first trial.

BAYLEY B.—In *Gibbins* v. *Phillips* (*a*), Lord *Tenterden* says, the general rule is, that the party ultimately succeeding is entitled to the costs occasioned by the cause having been made a remanet. There is no distinction in principle between that case and the present.

The other barons concurred.

**Rule absolute.**

(*a*) 8 B. & Cr. 437.

*Note.*—The above case was furnished by a master of the Court of King's Bench. An under-sheriff having mislaid the writ of distringas juratores, the cause could not be tried at the first assizes. At the following assizes it was tried, and the plaintiff had a verdict. The master allowed the plaintiff the costs of going down the first time in the same manner as if the cause had been made a remanet, and on motion to review his taxation the court held it right.

1832.

MUIR *against* SMITH.

Bail—consequences of omitting the number of the house of a bail residing in a place where the houses are numbered.

ON bail appearing to justify, *Addison* objected that the notice of bail did not mention the numbers of the houses where the bail resided within the last six months, according to *Reg. Gen.* Trin. 1 *W.* 4, [Vol. I. 520]. He produced an affidavit that the houses where they lived were numbered. He also objected to the bail-piece as being of 3d instead of 2d *W.* 4.

BAYLEY B.—(Sitting as the single judge.)—The bail-piece may be re-acknowledged. The plaintiff has found the bail; now I will either give him time to make further inquiries after them, or give him the costs of his affidavit and appearance here. In the latter event they may justify now.

The bail justified.

*Channell* in support of the bail.

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SHEPPARD, Assignee of ROSE, *against* SHUM.

Service of bailable process set aside for irregularity, in not having stated the name of the attorney immediately retained by the plaintiff, pursuant to 2 *Geo.* 2. c. 23. s. 22.

SIR *W. Owen* had obtained a rule to set aside a writ of quo minus serviceable for irregularity with costs, and for staying proceedings on notice of the rule to be given to Messrs. *Williams* and *Bethel* of &c., omitting the usual notice to the plaintiff's attorney or agent.

1832.

SHEPPARD v. SHUM.

The name of the attorney actually employed by the plaintiff is not indorsed on the process, as required by *Reg. Gen.* Mich. 1 *Will.* 4. No. II. in this court (*a*); but the names of the agents only.

The process was sued out by Messrs. *W.* and *B.*, attornies of this court, as agents to *Mackey* an attorney residing at *Bath*, who was sworn to be immediately employed by the plaintiff in the cause, but was not admitted in this court. In *Miller* v. *Bowden* (*b*), the above rule of court was held directory only; but that case did not turn only on the words of this rule, but also on the offer to pay the costs there made; and 2 *Geo.* 2. c. 23. s. 22. did not there apply. By that act every writ and process for arresting the body shall, before *service* or execution thereof, be subscribed or indorsed with the name of the attorney by whom such writ &c. shall be sued forth; and where he is not the person *immediately* retained or employed by the plaintiff, then also with the name of the attorney, &c. so immediately retained, &c.; and every copy of any writ, &c. that shall be served on any defendant, shall before the service thereof be in like manner subscribed or indorsed with the name of the attorney *immediately* retained &c. by the plaintiff. Then the copy must be set aside for irregularity, *Wright and another* v. *Willes* (*c*). For the object of the statute being, that payment shall be made by the defendant to the plaintiff or his attorney, that object cannot be obtained by payment to the agent of the latter; which is held not to be a payment to the plaintiff; *Yates* v. *Freckleton* (*d*).

*Espinasse* showed for cause, that the name of the

(*a*) *Ante*, Vol. I, 157, and Appendix, p. iv. As to process issued since 2 *Nov.* 1832, see a similar, but stronger provision by stat. 2 *Will.* 4. c. 39. s. 10.

(*b*) *Ante*, 112. (*c*) Tidd, 9th ed. 160, note. (*d*) Doug. 623.

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attorney immediately employed in the cause could not be indorsed on the writ, as he not being an attorney of this court could not sue therein; and that the information which it was the object of the act to afford could be obtained from the agents whose names were indorsed. He also produced an affidavit that the defendant had been informed who the attorney was.

Lord LYNDHURST C. B.—This process might have been indorsed in the name of the attorney immediately retained, and in that of an attorney of this court in whose name or by whom the former might be stated to practice. The object of the rule and of the act which have been cited was, that the defendant, by being made acquainted with the party who issued the writ, might have an opportunity to go to or communicate with him. In this case the copy of the process is not indorsed pursuant to the statute *2 Geo. 2. c. 23. s. 22.* and the attornies indorsing are not the persons immediately retained.

Rule absolute.

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## BOWMAN *against* RUSSEL and Another.

Costs of bringing bail up to justify allowed, where they have given notice of putting in and justifying at the same time, accompanied by an affidavit of justification, and after exception attend to justify, and are not opposed.

*FISH*, for one defendant, moved for the costs of bringing up the bail, who having made the new affidavit of justification, [Vol. I. 521, and Appendix,

p. vii.] were afterwards excepted to, and had now appeared and justified without opposition.

*Hutchinson* for the plaintiff said, the affidavits were not filed with the bail-piece, so that the bail must have attended to take the recognizance of bail out of court.

*Fish.* It does not appear that the affidavit must be so filed.

BAYLEY B. (Sitting alone.)—The bail for this defendant have justified. Then as there is an affidavit of service of notice of justification on this day, that is sufficient.

Motion granted.

In the matter of the Bail of the other defendant.

*J. Jervis*, for the plaintiff, objected that they were new bail substituted by a judge's order. Then though two days' notice of putting in and justifying them at the same time has been given before eleven o'clock on *Monday* morning, for *Wednesday* morning, according to *Reg. Gen.* Trin. 1 *Will.* 4. [Vol. I. 520,] and *Reg. Gen.* Hil. 2 *Will.* 4, *Reg.* 1. No. 16, [ante, 342], that rule does not apply to new bail.

When the notice of bail was to *add* and justify at the same time, was regularly served, and the new bail were substituted by a judge's order on the morning of justification, the court refused costs of the plaintiff's opposition on that ground, but offered time to inquire after them.

BAYLEY B.—The notice is to *add* and justify. Now the general rule first cited applies to cases where no bail were originally put in, and not to this where bail were put in, and an order to change them has been subsequently obtained. I will give the plaintiff time to inquire after the new bail if required, but will not allow costs of the plaintiff's coming here to day.

*J. Jervis* declined to take time, as offered, and after opposition, the bail justified.

## LARKEN *against* BOVILL.

Affidavit in support of motion for costs of day, for not proceeding to trial, allowed to be amended.

*J. JERVIS* having given notice of intending to show cause against *Chilton's* rule nisi for costs of the day for not proceeding to trial, on the ground that no default to try was shown by the affidavit, which merely alleged that the plaintiff had not proceeded to trial in due time, without stating when issue was joined, which in fact was done long enough ago to ground the motion,

The court directed that the affidavit should be amended, without costs (*a*).

(*a*) See *Smith* v. *Parslow*, *ante*, 284.

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## LINLEY *against* BATES.

The putting into the post a letter in a county where goods were made, directed to *A.* in another county, and containing an invoice of the quantity, quality, and price of goods sent at the same date to *A.* by another conveyance, is material evidence in the first county, so as to satisfy an undertaking by the plaintiff to give material evidence there.

DEBT for the balance of an account for axle-trees and spring steel, sold and delivered by the plaintiff to the defendant. Plea, general issue and notice of set-off for eight axle-trees and eight bundles of steel returned or delivered to the plaintiff, as per invoices sent to him, and for cartage thereof from the defendant's premises to a canal wharf. The plaintiff was an iron-manufacturer living at *Sheffield*, the defendant a coach-spring smith in *Curtain Road*, *Middlesex*. The contract was made in *Middlesex* for the sale of goods by the plaintiff to the defendant, to be delivered by the plaintiff at a wharf in *Islington*, in that county. The plaintiff's invoice charged the defendant with the carriage from *Sheffield* to *London*, but that carriage was

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allowed again. The venue was laid in *Yorkshire*, and having been changed to *Middlesex*, was afterwards brought back to *Yorkshire*, on the usual undertaking to give material evidence in that county. The plaintiff then, after proving the contract of sale to have taken place in *Middlesex*, proved, by his book-keeper, that he was employed by the plaintiff at *Sheffield* to make out his invoices; that he made out two and sent them by post from thence in covers addressed to the defendant at *Shoreditch*; that they contained an account of quantities, prices, &c. of the axles and spring steel in question forwarded to the defendant on the same date by water. That the amounts charged were the then current prices. Notice having been given to the defendant to produce the invoices and the letters inclosing them, and not having been complied with, they were read from the plaintiff's invoice book. It was also proved that the goods were delivered at the defendant's premises in *Curtain Road*, twelve months after which the goods mentioned in the set-off were returned by the defendant to the plaintiff, who, at the same time, offered to pay the balance, after allowing the returned articles in part payment of the plaintiff's demand, but without requesting them to be changed or altered. The plaintiff was disabled by an accident when the returned articles arrived at *Sheffield*, but returned them back about three months after, directed to defendant, to the canal wharf in *London*, where they still remained.

At the *Lent* assizes for *Yorkshire*, *Bolland* B. thought that no material evidence had been given in that county; the contract and delivery having both been made in *Middlesex*. The plaintiff was nonsuited (*a*); with leave to move to enter a verdict for 15*l*. the value of the goods delivered.

(*a*) *Saintier* v. *Heard*, 2 Bla. R. 1031.

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A rule having been accordingly obtained,

*Jones* Serjt. and *Rotch* showed cause. The question is, whether the undertaking to give material evidence in *Yorkshire* was performed? For if it was, the nonsuit cannot be maintained. The present rule is, that *some* evidence must be given in the cause, which must be *material, materiâ ibidem surgente* (*a*), *viz.* concerning the cause of action (*b*) as stated in the declaration (*c*), though the early cases are *contra* (*d*). Now the contract and delivery were made in *Middlesex*, and the witnesses who proved that and the delivery came from thence. Then was not the delivery also in *Middlesex?* If the delivery to the carrier at *Sheffield* was a delivery to the defendant in *Yorkshire*, that would be material evidence in that county, *Powell and others* v. *Rich* (*e*); but the carriage per canal was at plaintiff's risk up to the delivery at the defendant's premises in *Middlesex*, for the plaintiff charged the defendant with the expense of conveyance. [*Bayley* B. The material fact of sending the invoice is proved by the plaintiff to have taken place in *Yorkshire*.] The mere sending the invoice by post from *Sheffield* is not material till the invoice so sent is acquiesced in and something is done on it in *Middlesex* by the defendant. [*Vaughan* B. Would the plaintiff have been nonsuited if the invoices had never been produced? Was not the putting them in the post at *Sheffield* material evidence?] Suppose an invoice written in county *A.*, put in the post in county *B.*, and received and acted on in county *C.*; would that be material evidence in each county, or in county *C.* only? But the invoices were not material to the plaintiff's

(*a*) 2 Sir W. Bla. 1032, 1034. (*b*) *Clarke* v. *Reed*, 1 New R. 310.
(*c*) *Cockerell* v. *Chamberlayne*, 1 Taunt. 518.
(*d*) Tidd, 9th edit. 612, note (*f*).
(*e*) 2 Marsh, 494; 7 Taunt. 178, S. C. but not S. P.

case, for the contract and delivery were established *aliunde* to be in *Middlesex*, and the amount of value, as proved by the *Yorkshire* book-keeper, was not material to the whole action.

*J. Williams* and *Heaton* contrà.—The defendant assumes that the whole cause of action must be proved to have arisen in *Yorkshire*, without fixing how great a part of the evidence is so to arise; whereas it will suffice if *some* evidence be given of facts material to the cause of action, and appearing to have occurred in that county. If the amount of value of the goods was not proved, the verdict could only be for nominal damages. Material evidence does not import the *summa probatio* as incontestible demonstration of a fact, and admitting no limit or contradiction; but proof material to the issue. Then the furnishing the invoices from *Yorkshire*, by putting them into the post at *Sheffield* (*a*), is material evidence arising in that county, in order to prove part of the cause of action, *viz.* the value of the goods invoiced; the delivery to the carrier and to the defendant being proved *aliunde*, and the first-mentioned delivery being material evidence in *Yorkshire*; *Powell* v. *Rich* (*b*). The evidence, not the cause of action, must arise in *Yorkshire*; see *per Burrough* J. *Smith* v. *Walker* (*c*). That case also shows, that proof that letters containing the contract sued on had been written and put into the post-office in the third county, would satisfy this undertaking.

BAYLEY B. (*d*)—I am of opinion that this rule must be made absolute to enter a verdict for the plaintiff for

(*a*) *Rex* v. *Burdett*, 4 B. & A. 95; 3 B. & A. 744, S. C.; see *Pearson* v. *M'Gowan*, 3 B. & Cr. 700; *Rex* v. *Hensey*, 1 Burr. 647.

(*b*) 2 Marsh, 494. (*c*) 8 Taunt. 169.

(*d*) Lord *Lyndhurst* was sitting in equity.

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the amount fixed. No hardship appears to me to arise, for the defence was rested on the bad quality of the goods. Then if the plaintiff had thought that the defendant's evidence on that head was sufficiently strong to require to be answered, his witnesses must have come from *Sheffield*, where the goods were made. In my opinion the sending an invoice from *Yorkshire* to *London*, directed to the defendant's place of residence, was material evidence within this undertaking, for two purposes—one, for showing the nature of the articles furnished; and, secondly, the price which the plaintiff insisted the defendant undertook to pay for the articles. I agree that sending invoices does not bind a defendant if he points out a misrepresentation; but if there is any reason to believe that the invoices were received in course of post, and no answer was received to the letter, proof of putting them into the post is evidence to show that the articles specified in them were furnished to the party charged, and that the prices affixed were those undertaken to be paid. In the present instance the articles are specified, with prices for each item, axle-trees, &c. Now what is the natural course of proceeding on sending the letters directed to the defendant, each containing an invoice? In all human probability the letters would arrive at the directions; if they did, and the defendant kept silence, that would be a *primâ facie* acknowledgment by him that the goods had reached him, and that the prices charged in the invoices were current prices. Here there is no evidence of any answer to the contrary; then is not that evidence to go to the jury that those invoices did reach the defendant? Supposing they did not reach the defendant, there is no doubt the articles were sent; and if sent without invoices, would not the defendant naturally complain of not knowing the quantities or prices of them? The absence of complaint is strong evidence that what

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would naturally occur in the course of business did so occur. That the plaintiff's book-keeper might look to the invoice-book and satisfy a jury that he had sent an invoice, specifying quantity and price, appears to me most material; for it raises a *primâ facie* evidence of the quantity of goods sold and of the prices the plaintiff expected to receive from the defendant. Then the defendant's not repudiating the prices, founds a case for the verdict of a jury that those were the prices agreed on. Suppose the plaintiff to have proved all the steel to have been sent, but not the axles or the prices, evidence must have been given on those defective and contradictory accounts. Probably the jury might find a verdict for the lesser quantity. In my view the delivery of invoices would remove all difficulty as to amount and price, and I am therefore of opinion that they were material evidence for the plaintiff.

VAUGHAN B.—I am of the same opinion. To see whether the sending of the invoices were material evidence or not, the issue must be seen. The question on that is on the sale and delivery of goods; but there was also a particular specifying "warranted spring steel;" then as some defence arose whether the articles were properly manufactured as warranted by the invoices, some having been returned on account of their alleged inferior quality, the plaintiff is to show what the defendant was bound to take and what to pay for. The question is, whether the testimony of *Askham*, the plaintiff's book-keeper, was material? He was called to prove that he was employed to make invoices, and that he made and sent the invoices in question by the *Sheffield* post. He also proves the return of a part of the goods to the plaintiff. The jury found for the defendants as to the value of part, *viz.* of

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the axle-trees. Is it not important that the steel was returned to the plaintiff in *Yorkshire*, and afterwards properly sent back by him from thence to the plaintiff? Besides the payment of part was proved by the defendant to have been received in the county of *York*. The production of a rule for payment of money into court admits the contract, and has been held sufficient to satisfy this undertaking, though that rule is not a part of the original cause of action, and took place after the rule for changing the venue had been discharged, *Watkins* v. *Towers* (*a*). So, in an action by assignees, the mere production of a commission of bankruptcy tested at *Westminster*, in *Middlesex* has been held a compliance with this undertaking (*b*). I am of opinion that to satisfy this undertaking the evidence must be material to the issue, but the quantum of its materiality is not a matter for discussion. If any one fact material to be proved at the trial is proved to have taken place in the proper county, that is sufficient.

BOLLAND B.—I am of the same opinion. The invoices were material evidence even for the defendant, as by stating the steel to be warranted, they laid a foundation for his defence, that its quality was inferior. The purchaser in *London* complains of the quality of the goods and sends them back to *Sheffield*; then what had the plaintiff to do? It was incumbent on him to show that he returned these goods to the purchaser, and did not adopt his complaints. Take away this evidence, the plaintiff would have traced their return to *Sheffield* as returned goods and leaving them at the plaintiff's warehouse. What is the fair inference? Why, that he adopted the *London* purchaser's complaints, and it

(*a*) 2 T. R. 275. (*b*) *Kensington* v. *Chantler*, 2 M. & S. 36.

would have been an admission that they were not of proper quality. Leaving that out of the case, I cannot but think it material evidence.

Rule absolute to enter a verdict for 15*l.*

The defendant had been arrested for 37*l.* due to the plaintiff for axle-trees and spring steel. The defence at the trial was the bad quality of both descriptions of goods, and the plaintiff's agreement to take them back on that account. The plaintiff was nonsuited as above, but had leave to enter a verdict for 15*l.*, the value of the steel only, if the court should set aside the nonsuit. The defence having thus succeeded as to the axle-trees,

Goods having been sold and delivered by plaintiff to defendant, defendant objected to them for bad manufacture, and plaintiff agreed to take them back. They were accordingly returned to the plaintiff, who afterwards sent them back to the defendant, and arrested him for their value. A verdict having been entered for the value of part only, being a less sum than that for which defendant was arrested; Held, that he was entitled to costs, under 43 *Geo.* 3. c. 46. s. 3.

*Platt* afterwards obtained a rule for referring it to the master to tax the defendant his costs of suit, plaintiff not having recovered the amount for which defendant was arrested and held to special bail; and why the defendant should not be entitled, after deducting 15*l.* recovered by the plaintiff in this action, from the amount of his costs so to be taxed as aforesaid, to take out execution for such costs in like manner as a defendant may by law have execution for costs in other cases, and that the plaintiff be restrained from taking out execution against the defendant, pursuant to stat. 43 *Geo.* 3. c. 46. s. 3.

The defendant's affidavits stated that he was unable to use the axle-trees and steel of the plaintiff on account of their bad manufacture, and that plaintiff, when in *London* in *April* or *May* 1830, agreed with defendant to take them back. That they were accordingly sent back to *Sheffield*, and arrived there in *August* 1830, when the plaintiff's carman took them from the wharf. That after keeping them till *December* they were sent

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back to a wharf in *London*, where on the 14 *December* 1830 they arrived. The steel was not taken back by the defendant till after the trial, and the axle-trees were left at the wharf.

*J. Williams* and *Heaton* showed cause. The plaintiff had a fair cause of arrest for the whole sum, for the objection to the quality of the steel was found for him, and the only defence was the alleged imperfections of the axle-trees.

*Platt* and *Rotch* contrà. Under the words of the statute the plaintiff must show affirmatively that he had reasonable or probable cause for the arrest. Here his affidavits show no such cause; while the defendant's affidavits expressly state that the plaintiff agreed to take back the goods, on account of the defendant's not being able to use them.

*Per curiam.*—An objection to the quality of the goods had been made by the defendant before the arrest. Then the defendant's affidavits show that the plaintiff expressly agreed to take them back. Though the verdict has applied that agreement to the axle-trees only, there does not appear to have been reasonable or probable cause for arresting the plaintiff for the whole sum of 37*l.*

Rule absolute.

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CLARKE *against* ADAMS.

*KELLY* had obtained a rule to set aside an interlocutory judgment for irregularity. An order had been obtained for time to plead, on the terms of pleading issuably, taking short notice of trial, and rejoining gratis. Non assumpsit and the statute of limitations having been pleaded on 28 *May* 1824, a replication was delivered on 29 *May* concluding to the country with demand of rejoinder, which demand not having been complied with within 24 hours, judgment was signed on the 30th for want of a rejoinder. *Kelly* produced an affidavit of merits.

By the terms of "rejoining gratis" is meant not only to dispense with the rule to rejoin, but also with the time given by it, so that the defendant must rejoin within 24 hours after demand of rejoinder.

*Platt* showed cause in support of the judgment. Issue having been taken, plaintiff might have added the similiter himself, and need not have demanded a rejoinder. Then the defendant should have rejoined within 24 hours. *Wye* v. *Fisher* (*a*) shows the judgment to be regular, though in that case it was set aside without costs.

*Kelly* contrà. The question is, whether the word *gratis* dispenses not only with the rule to rejoin, but with the four days' time allowed by that rule for rejoining? It is contended that the defendant, on the demand of rejoinder, was bound to rejoin in 24 hours, or on the morrow; that would be tantamount to an order to plead instanter (*b*), which is never imposed except under special circumstances. But the defendant in that case would be aware of the declaration; whereas here, when the order for time to plead was obtained, he could not tell what rejoinder might be

(*a*) 3 B. & P. 443.

(*b*) Tidd, 9th ed. 567, note.

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requisite, and judgment might be signed before he could apply to a judge for time to rejoin, however necessary it might become. But does *gratis* mean rejoining in any shorter time than the defendant otherwise would have done? and is the four days' time from the service of the rule to rejoin given by that rule, or independently of it?

Lord LYNDHURST C. B.—In common practice the rule to rejoin is a four-day rule. Now the defendant's undertaking to rejoin *gratis* saves the expense of a rule to rejoin, and compels the party to rejoin gratis, that is, to rejoin without what might otherwise be required, viz. without being ruled to do so, and on demand of rejoinder. Now whatever a party is bound to do on demand, he must do in 24 hours; but is there any thing here to extend that time further? For the rule to rejoin, which would have given more time, does not exist. I am therefore of opinion that this defendant was bound by his undertaking to rejoin within 24 hours after demand for that purpose, and that such a demand dispenses entirely with the rule to rejoin, and the consequences as to time which flow from it. The terms of "rejoining gratis" would otherwise have no meaning.

BAYLEY B.—The defendant here stands on the demand of rejoinder, which is out in 24 hours, and has nothing to do with the rule to rejoin. It would make a considerable difference in a town cause whether the time to rejoin is four days or one day only. Here, the defendant is deprived of the rule to rejoin by his own consent to rejoin gratis, *i. e.* without that rule. Nor need any hardship arise, for on getting an order for time to plead, terms of "rejoining gratis in two days" might be provided so as to afford an opportunity of applying to a judge for further time to rejoin, if re-

quired. The master certifies to us that the practice has been considered to be that which we now lay down.

The other barons concurring,

Rule absolute for setting aside the interlocutory judgment on payment of costs, on terms of rejoining on *Monday* (rule being drawn up on *Friday*) and taking such notice of trial as the plaintiff could give for the sittings after the term.

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GRIFFITHS *against* KYNASTON, HARRIS and another.

Three defendants being sued in trespass for assault and false imprisonment, appeared by the same attorney, but severed in pleading. The same evidence was adduced for all, with the exception of one witness, who was called for one of them separately. That one being acquitted, the master taxed him 40*s.* costs only:—Held, that he was entitled on taxation to receive from the plaintiff his aliquot proportion of the costs incurred by the three on their joint retainer, as well as the costs he had separately incurred, on satisfying the master that he was not indemnified by the other defendants.

G. *HAYES* moved for a rule calling on the master to review his taxation as to costs taxed by him to *Kynaston*, one of the three defendants. The action was against three defendants for assault and false imprisonment. They appeared by the same attorney, but severed in pleading at the trial; the same witnesses were called for all the defendants except one, who was called for *Kynaston* only. *Kynaston* was acquitted. On his presenting a bill of costs to be taxed, the master allowed him 5*l.* costs only, their real amount being 90*l.* Stat. 8 & 9 *Wm.* 3. c. 11. s. 1. enacts, that where several persons shall be made defendants to any action of, *inter alia*, assault or false imprisonment, and any one or more of them shall be, upon the trial, acquitted by verdict, every person or persons so acquitted shall have and recover his costs of suit in like manner as if a

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verdict had been given against the plaintiff or plaintiffs and acquitted all the defendants, unless the presiding judge shall, immediately after the trial, certify upon the record under his hand that there was a reasonable cause for the making such person or persons, or defendant or defendants. The master allowed such costs as appeared to him to be separately incurred by the defendant *Kynaston*, but had a separate attorney been employed and separate briefs prepared, the plaintiff would have been subjected to greater expense. Here the defendant is liable to contribute his share of the general expenses on a joint retainer by himself and others, which lessens the plaintiff's ultimate costs. [*Bayley* B. Every part of the costs incurred separately by the defendant ought to be allowed.]

A rule having been granted,

*Whateley* showed cause.—The attorney for the defendants being unable to show the master any separate retainer from *Kynaston*, admitted he incurred no expenses for him which he must not have incurred in defending the other parties, except the expense of one witness. The master having allowed 40*s*. only, the plaintiff offered five guineas for the expense of that witness, which was not accepted. In *Hughes* v. *Chilty* and another (*a*), the defendants pleaded not guilty jointly in trespass and assault, one was acquitted, and the court held that he was only entitled to 40*s*. costs, saying, that to allow increased costs to him would be making the plaintiff pay the costs of the other defendant. Though they also said that pleading separately might have made a difference, yet the reason they acted on still applies; and *Holroyd* v. *Breare* (*b*) shows that the circumstance of two defendants ap-

(*a*) 2 M. & S. 172, citing Barnes, 131. (*b*) 4 B. & Ald. 700.

pearing by the same attorney, rules the allowance of costs by the master, though the pleading be separate.

*Hayes* in support of the rule. The question is as to the quantum of costs to be allowed. Now the statute did not intend to give nominal costs, but to give the defendant his real costs, occasioned by being unnecessarily sued by the plaintiff; and this defendant only claims from the plaintiff that proportion of the real costs, for which, he, as such defendant, would be liable to the other defendants, and the attorney, on the joint retainer of the three defendants. If the other defendant should become insolvent, this party would be obliged to pay not only his own one-third, but the other two-thirds of the costs actually incurred. Had it been sought to make the plaintiff pay the whole, or two-thirds of the costs, the observation cited from *Hughes* v. *Chitty* might apply, that it would be making the plaintiff pay the costs of the defendant, against whom he got a verdict. In *Holroyd* v. *Breare and another*, half costs were allowed to the defendant, for whom a verdict was entered generally, he having appeared by the same attorney as the other defendant, but having pleaded separately. On the same principle one-third is here claimed. If a contrary rule is established, then if ten defendants are sued in trespass, and one only is found guilty, none of the nine would get costs, unless the expenses of separate attornies, counsel, briefs, &c. were incurred to the injury of the plaintiff. The word *costs* in a statute is synonimous with full costs, *Irwins* v. *Reddish* (*a*). In *Barnes*, 131, it was attempted to impose on the Court by stating costs actually incurred for the benefit of all to be incurred for the benefit of one only, and the applicant was in-

(*a*) 5 B. & Ald. 798.

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demnified against loss. If there be a distinction between severing in pleading and pleading jointly, the latter shows the defendant determined to stand on his own ground of defence; thus differing this case from *Hughes* v. *Chitty*.

BAYLEY B.—The master states to us that if several defendants in trespass join in pleading, and one has a verdict, the general practice is to allow only 40*s*. unless costs are separately incurred; and that if several defendants sever in pleading, and one has a verdict, 5*l*. is the limit of the costs allowed him, excepting separate costs as before. In the King's Bench 5*l*. only is allowed in such a case. But there is great weight in the observations of Mr. *Hayes*, and we will inquire into the practice. If there has been an invariable course we are bound by it, but if otherwise, we shall enforce whatever appears to be the justice of the case under the statute.

Afterwards, in *Michaelmas* term,

BAYLEY B. delivered the judgment of the Court.—The judges are of opinion that this defendant is entitled to the aliquot portion of costs of the other defendants, as well as to his own separate costs, he satisfying the taxing officers that he has not been indemnified by the other defendants.

Rule absolute (*a*).

(*a*) See *Cox* v. *Thomason*, *ante*, 411.

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## REGULA GENERALIS,

### COURT OF EXCHEQUER CHAMBER,

*Michaelmas Term, 2 Will. 4.*

IT IS ORDERED, That henceforth the costs of proceedings upon writs of error from the Court of Exchequer to this court be taxed and allowed by the master of the Court of Exchequer.

TENTERDEN, J. B. BOSANQUET,
N. C. TINDAL, W. E. TAUNTON,
S. GASELEE, E. H. ALDERSON,
JAMES PARKE, J. PATTESON.

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## MEMORANDUM.

*JOHN WILLIAMS*, Esq. and *C. C. Pepys*, Esq. having resigned their offices of Attorney and Solicitor General to Her Majesty, Mr. Serjeant *Taddy* and Mr. Serjeant *Merewether* were appointed in their room.

END OF TRINITY TERM.

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AN

# INDEX

TO THE

# PRINCIPAL MATTERS

## IN THIS VOLUME.


### ABATEMENT, PLEADING IN.

A declaration in assumpsit in a country cause, was delivered after post hour on a *Saturday* night. A plea in abatement was afterwards delivered within the time fixed by the practice, stating that the promises, if any such were made, were made by the defendant jointly with one *J. W.* The affidavit verifying the plea had been sworn several days before the declaration was delivered, in order to prevent the loss of a plea in abatement. Interlocutory judgment having been signed as for want of a plea, the court held it regular, but, under the circumstances attending the delivery of the declaration, set it aside on payment of costs and affidavit of merits.

*Semble*, that the defendant's proper course would have been to have applied for further time to plead in abatement. Affidavit of merits is sufficient, if sworn by the agent of the country attorney on information and belief, if the facts are uncontradicted. *Johnson* v. *Popplewell*, T. 1832. 715

### AFFIDAVIT TO HOLD TO BAIL.

Affidavit to hold to bail for rent due, money paid, &c. is bad if it does not allege the money to have been paid, &c. "at defendant's request;" but an application to discharge a defendant on account of this defect is too late after bail above put in. *Reeves* v. *Hucker*, M. 1831. 161

An affidavit to hold to bail, which states a sum above 20*l.* to be due from defendant to plaintiff as indorsee of a bill of exchange, need not state the amount of the bill, but it must state by whom the bill was indorsed to the plaintiff. *Lewis* v. *Gompertz*, H. 1832. 317

An affidavit to hold to bail "for money paid, laid out and expended to and for the use of the defendant," is bad, for not stating that the money paid, &c. was so paid, &c. "at the request" of the defendant. *Marshall* v. *Dawson*, H. 1832. 315

The residence of a deponent in an affidavit to hold to bail is properly stated as "clerk to *S. A.* and *J. I. I.* of Chiswell-street, in the county of Middlesex, stable-keeper," without more particularly describing the residence. *Alexander* v. *Milton*, E. 1832. 495

Affidavit to hold to bail was made by a clerk to *Lewis Joseph John Noel*, and stated a debt due from defendant to said *John Noel*. The *quo minus* stated the plaintiff to be *Lewis Joseph John Noel*. The court refused to suffer a sum paid into court in lieu of bail to be paid out to defendant on filing common bail. *Noel* v. *Williams*, E. 1832. 388

Where a defendant had been arrested on an affidavit to hold to bail founded upon three promissory notes, which was defective as to two of them, but was good as to the third, for a bailable amount, the defendant was nevertheless discharged on filing common bail. *Kirk* v. *Almond*, H. 1832. 316

An affidavit to hold to bail by payee against the maker of a note, must state when it was payable, or that it is due at a day past and yet is unpaid. *ib.*

The plaintiff's affidavit of debt was in the character of an executor, but the process was general and bailable. The court refused to order the bail bond to be delivered up to be cancelled on account of this variance. *Ilsley* v. *Ilsley*, H. 1832. 214.

## ACTION.

Barring former recovery. See *Hadley* v. *Green*. 390

## AFFIDAVIT OF MERITS.

See *Johnson* v. *Popplewell*, 715.

## AGENT.

See HUSBAND and WIFE.

Liability of principal for illegal act of. *Attorney-General* v. *Riddell*, T. 1832. 523

## ARBITRATION and AWARD.

See EXTENT IN AID.

*Indebitatus assumpsit* for a debt of 50*l.* Plea, that differences having arisen between plaintiff and defendant touching the said claim, the matter in difference was referred, and an award was made by which 13*l.* only was directed to be paid by plaintiff to defendant, without averring the performance of the award by payment of that sum. Plea held bad on demurrer, being no answer to the action for a debt, such debt and its amount being all that was referred, and the award being for payment of money, and not for performance of any collateral act. *Allen* v. *Milner*, M. 1831. 113

Three actions between the same parties were brought in the Exchequer and one in K. B. They were referred to the same arbitrator, on the terms that the order of reference should be made a rule of the K. B. or Exchequer, and the original order was made a rule of court in K. B. The arbitrator awarded distinct sums to the plaintiff in each action: Held, that the

order could not be afterwards made a rule of court in Exchequer as to two of the actions there, in order to separate attachments in two of the actions in which a third party was the real plaintiff, but that his application must be to the K.B. *Winpenny surviving Executor* v. *Bates*, E. 1832. 466

## ARREST.

See AFFIDAVIT TO HOLD TO BAIL—MISNOMER—BAIL.

A defendant may be arrested for sums paid by plaintiff as obligor of an indemnity bond as for liquidated damages, if the sums the plaintiff has been called on to pay can be ascertained. *Anderson* v. *Bell*, T. 1832. 732

Goods having been sold and delivered by plaintiff to defendant, defendant objected to them for bad manufacture, and plaintiff agreed to take them back. They were accordingly returned to plaintiff, who afterwards sent them back to the defendant, and arrested him for their value. A verdict having been entered for the value of part only, being a less sum than that for which defendant was arrested: Held, that he was entitled to costs under 43 *Geo.* 3. c. 46, s. 3. *Linley* v. *Bates*, T. 1828. 753

## ATTORNEY and SOLICITOR.

The court has an inherent jurisdiction to tax the bills of attornies practising in it, independently of the powers given by statute 2 *G.* 2. c. 23. s. 23. in cases where no actions have been brought on such bills. Therefore where an action was pending on an attorney's bill against two defendants, and a baron at chambers, on application of one of them, made an order for taxation without imposing the terms of an undertaking to pay the sum found to be due, the court refused a rule to rescind the order and impose such terms, for the order was made at common law and not under the statute. *Watson* v. *Postan and another*. E. 1832. 406

The application to tax an attorney's bill for business done in suing out and prosecuting a commission of lunacy should be made to the Lord Chancellor, though after action brought on the bill in a court of law. Whether a bill of such charges is taxable under 2 *Geo.* 2. c. 23. as for charges in law or equity, *quære*. *Jones, Gent. one &c.* v. *Bywater*, E. 1832. 402

An attorney's bill will be referred to the Master to be taxed, after it has been paid, if the motion be made in a reasonable time, though no fraud be imputed. *Glascott* v. *Castle*, H. 1832. 302

A solicitor admitted and enrolled in the court of Chancery may conduct a suit in the court of equity in the Exchequer Chamber, in the name of a clerk in the King's Remembrancer's office in that court, and is entitled to costs on taxation, though he is not admitted a solicitor in that court of equity. *Attorney-General on relation of Crupper and others* v. *Malin and others*, T. 1832. 512

Where an attorney had claims on his client for conveyancing, and also for charges at law, and received payments on account, without specific appropriation to either head of debt: Held, that the whole formed one entire demand not to be separated, and that the plaintiff could not apply the payments to the common law items of his demand only, so as to deprive the defendant of the benefit of taxation *quoad* the residue of the bill. *James*, Gent. one &c. v. *Child*, T. 1832. 732

*Semble*, that the drawing and ingrossing of a warrant of attorney is a taxable item. *James*, Gent. one &c. v. *Child*, T. 1832. 732

Indorsing attorney's name on process. See PRACTICE (*Irregularity*).

## AUCTION.

A printed catalogue of sale contained, among others, this entry:—"Lot 6. Ten acres of spring wheat on the further hill," with this memorandum at the foot, "The keep of all the fields will be sold with the lots." By the conditions of sale, purchasers were to pay a deposit and give security for payment of the remaining purchase money on the next 17th day of December. At the sale the auctioneer verbally informed the persons present, among whom were the plaintiff and defendant, that lot 6 was not spring wheat, and that the keep had been sold by private contract. Plaintiff bought the lot, and the auctioneer inserted his name in the sale-book as purchaser. The plaintiff and defendant afterwards desired the auctioneer to set down the lot to the defendant as buyer, and to send in the account to him. The auctioneer thereupon wrote the defendant's initial L., opposite to the lot in the sale book and in the same line with the name of the plaintiff. Defendant asked if he should give security to pay for the crop on the 17th December, according to the conditions of sale. The plaintiff waived taking it, but received the deposit from defendant. The crop was destroyed in a few days after the sale, and the defendant refused to pay the rest of the purchase money: Held, that as the auctioneer's declarations at the sale would not be evidence to vary the printed particulars, had an action been brought by the original seller against the plaintiff as buyer, so they would not be admissible in an action by him as seller under the original conditions of sale; and the court refused to set aside a nonsuit. *Shelton* v. *Livius*, E. 1832. 420

See FRAUDS, STATUTE OF.

## AUTHORITY.

See AGENT.

## BAIL.

When the notice of bail was to add and justify at the same time, was regularly served, and the new bail were substituted by a judge's order on the morning of justification, the Court refused costs of the plaintiff's opposition on that ground, but offered time to inquire after them. *Bowman* v. *Russell and another*, T. 1832. 744

Notice of bail need not state the bail to have resided for the last six months at the places of residence mentioned in the notice. *Fenton* v. *Warre*, M. 1831. 158

But see *Addenda*, back of p. 591.

Affidavits in support of an application to set aside proceedings on a bail bond may be entitled either in the original action or in that against the bail. *Lisle* v. *Chetwode*, M. 1831. 177

The rule of all the courts, T. 1 *W.* 4, by which defendants may now put in and justify bail at the same time, on giving four days notice, is an enabling, not a disabling rule, therefore a prisoner may still put in and justify bail on a two days' notice, as he might before it. *Davis* v. *Grey*, H. 1832. 276

Bail allowed to be changed on excuse offered, and on undertaking to pay costs incurred by putting in insufficient bail, and putting plaintiff in same situation as if good bail had

been put in at first. *Whitehead* v. *Mynn*, M. 1831. 160

Justifying bail who had made affidavit under *Reg. Gen.* T. 1 *W.* 4, but omitted to state they were housekeepers. *Martin* v. *Gell*, M. 1831. 166

Bail above having been put in, the defendant, who resided at *Birmingham*, became bankrupt, and surrendered to country commissioners; and on affidavit of the inconvenience to them of attending the bankrupt in prison in *London* or at *Warwick*, the time was enlarged for his render by the bail till after the day fixed for his final examination. Such application may be made by creditors of the bankrupt. *Harris* v. *Alcock*, E. 1832. 418

Costs of bail changed by judge's order for that purpose, must be paid before the bail can justify. *Jourdain* v. *Gunn*, E. 1832. 411

Costs of bringing bail up to justify allowed where they have given notice of putting in and justifying at the same time, accompanied by an affidavit of justification, and after exception attend to justify, and are not opposed. *Bowman* v. *Russell and another*, T. 1832. 744

Affidavit of justification of bail sworn in the country, stated the bail to be *possessed* of property to a certain amount, without further stating that each of the bail were *worth* double the sum for which defendant was held to bail above his own just debts, or every other sum for which he might be then bail: Held bad, but time given to amend on payment of plaintiff's costs of the day occasioned by the affidavit. *Darling* v. *Hutchinson*, E. 1832. 491

Bail put in may after exception, and on the day for justification, move for time to render defendant, without justifying, on the ground that he is in custody under warrant of commissioners of bankrupt. *Gibson* v. *White*, M. 1831. 162

The plaintiff's costs of inquiries after sufficiency of bail are costs in the cause. *Paine* v. *Munton*, M. 1831. 162

Practice on statement by bail that he has money at a place named. *Anonymous*, M. 1831. 158

Consequences of omitting the number of the house of a bail residing in a place where the houses are numbered. *Muir* v. *Smith*, T. 1832. 742

## BAIL BOND.

### (*Cancelling.*)

Where mesne process was returnable on the first day of term, an application to deliver up the bail bond to be cancelled, for a defect in the affidavit to hold to bail, must be made within the time for putting in bail above. *Tucker* v. *Colegate*, E. 1832. 496

## BANK NOTES, (LOCAL).

See TENDER.

## BANKRUPT.

### (*Depositions.*)

See EVIDENCE.

## BAR.

See ACTION.

## BILLS AND NOTES.

In an action by payee against makers of a promissory note, it appeared that it had been given on an agreement by one of them to buy crops, &c. from an outgoing tenant. The note when made was handed to a third person to be attested by him, and paid over to the plaintiff on

condition that possession of the premises should be given up to one of the defendants the next morning, but that the plaintiff was to hold the house for three or four weeks, paying one shilling a week rent. There was evidence of a verbal refusal by plaintiff on the next morning to give up possession, but the defendant's cattle were seen on the land on that day and remained there. Possession of the house was not obtained till three weeks after. The note when produced did not appear to have been attested, and there was no evidence how the plaintiff had got possession of it:—Held, that as no *act* was shown to have been done by the plaintiff to keep possession of the land, the jury might rightly conclude that possession had been delivered up according to the condition; and that the misconduct of the bailee of the note in withholding his attestation to it, or not delivering it to the plaintiff, was no defence to the action thereon. *Evans* v. *Morgan and others*, E. 1832. 396

A bill of exchange is drawn requiring payment to be made at a particular place mentioned in the body, viz. in *London*. The drawee accepts, payable at a banking-house there, viz. at *Jones, Loyd*, & Co. without further expression:—Held, that presentment to the acceptor at the place named in the acceptance was necessary to charge the *drawer*. *Gibb* v. *Mather and others*, H. 1832. 189

A rule was granted to compute principal and interest on a bill of exchange lost since declaration thereon, on the terms of producing a copy before the master, with an affidavit that it was a true copy, and that there was no indorsement on the bill itself. *Flight* v. *Brown*, H. 1832. 612

Expenses of noting and postage incurred on the return of an inland bill of exchange are not recoverable by the holder unless specially laid as damages and proved accordingly. *Kendrick* v. *Lomax*, E. 1832. 438

*Quære*. If a charge for noting is in any case recoverable on an inland bill not protested? *ib.*

Where, on a bill becoming due, the holder agrees to receive another bill in renewal of it, his remedy on the first is suspended till the second is dishonoured, as well for expenses incurred by nonpayment of the first as for its amount. *ib.*

## BISHOP.

See CURATE.

## CARRIER.

See STOPPAGE IN TRANSITU.

## CHARITY.

Where, by an ancient deed, *tempore Hen.* 6, land was conveyed to certain persons therein named and their heirs, in trust to apply the yearly profits to several public objects in a particular parish, and among others to the relief of the poor therein: Held, that the whole or part of them may be applied to building a school house and educating the poor children of that parish. *Wilkinson* v. *Malin and others*, T. 1832. 544

Where the whole number of existing trustees assembled to elect a schoolmaster: Held, that the act of the majority is to be considered the act of the whole body, for the trust to be performed is of a public nature; and *semble*, that where five concurred and two dissented, but did not act on that dissent, it is a concurrent election by all. *ib.*

A schoolmaster elected by a majority of trustees at a meeting of the body, cannot be dismissed except at a similar meeting. *Wilkinson* v. *Malin*, T. 1832. 544

A mistake in a deed in a statement of the then occupier of premises, will not vitiate, if the description of the parish is the same as in a former conveyance of same premises, and the intention to pass the same property is clear. *ib.*

A statement in pleading that a schoolmaster was appointed on the terms of a salary of 40*l.*, and a residence in the school-house, is satisfied by the salary being 20*l.* a year to himself for teaching boys, and the same to his wife for teaching girls. *ib.*

## COGNOVIT.

See PRACTICE.

## COSTS.

If costs are directed to abide the event, neither party has the costs of the first trial if the event of the second differs from that of the first. *Canham* v. *Fisk*, M. 1831. 155

In Exchequer a rule for costs of the day makes itself absolute unless cause be shown on or before a certain day, and cause cannot be shown after that day. *Scott* v. *Marshall*, M. 1831. 176

The reasonable costs of serving a notice of taxation on a defendant residing in the country, and having no attorney, will be allowed, and are not to be restricted to the charge for a letter by post. *Thorpe* v. *Worthy*, E. 1832. 489

Three defendants being sued in trespass for assault and false imprisonment, appeared by the same attorney, but severed in pleading. The same evidence was adduced for all, with the exception of one witness, who was called for one of them separately, one of them being acquitted:—Held, that he was entitled on taxation to receive from the plaintiff his aliquot proportion of the costs incurred by the three on their joint retainer, as well as the costs he had separately incurred, on satisfying the master that he was not indemnified by the other defendants. *Griffiths* v. *Kynaston and others*, T. 1832. 757

Costs under 43 *G.* 3. c. 46. s. 3. See ARREST.

Costs of petition against return of M. P. See PARLIAMENT.

Costs occasioned by juror's default. See TRIAL.

Costs of bail. See BAIL.

## COSTS OF THE DAY.

Affidavit in support of motion for costs of the day, for not proceeding to trial, allowed to be amended. *Larken* v. *Bovill*, T. 1832. 746

## COURTS OF REQUESTS ACT.

By the *Bradford*, *Melksham*, &c. court of requests acts, 3 *G.* 3. c. 19. (local) and 47 *G.* 3. sess. 2. c. xxxix. any debt or debts owing or due to or *claimed or demanded* by any person, whether resident within the jurisdiction of the court or not, and for which debt or debts he should *demand* any sum not exceeding 5*l.* from any person residing or living within the jurisdiction, are to be sued for in that court. The latter act extended the local limits of the jurisdiction, and increased its amount from 40*s.* to 5*l.* providing that a plaintiff suing in any other court for a debt recoverable under that act should not be entitled to costs, notwithstanding a verdict in his favour.

The plaintiff sued in the Exchequer for 5*l.* 10*s.* for work and labour, and after conflicting evidence had

a verdict for 4*l.* 10*s.* against a defendant resident within the above jurisdiction:—Held, that the word "demand" must be intended to be "rightful demand," and that the amount recovered by verdict in the superior court being in general the standard by which the jurisdiction of a court of requests, otherwise capable of the cause, is to be decided, a suggestion should be entered to deprive the plaintiff of his costs, notwithstanding the plaintiff might have been unable to compel the attendance before the local court of witnesses resident out of the jurisdiction: no fact that the plaintiff's case had miscarried from that circumstance being stated. *Drews* v. *Coles*, T. 1832. 503

A plaintiff residing in any part of *England*, who sues a defendant resident in *Bath* in any other court than the court of requests established there by 45 *G.* 3. c. 67, and recovers less than 10*l.*, may be deprived of his costs by suggestion on the roll. *Graham* v. *Brown*, H. 1832. 309

## CREDIT.

See GUARANTEE.

## CURATES.

*(Appointment of.)*

An incumbent regularly resided on a benefice containing more than 5000 inhabitants, and performed duty in the church, which was the only place of worship there. By requisition of the bishop, made under the authority of 57 *G.* 3. c. 99. s. 50. and stating "on his own knowledge, that the duties of the benefice are inadequately performed," he was monished that if he did not nominate a curate with the stipend named, a curate would be appointed by the bishop. The requisition not having been complied with, the bishop appointed a curate; and on the incumbent's refusal to pay his salary, sequestrated the benefice for payment of the arrears:—Held, that the requisition was in the nature of a judgment affecting the character and property of the incumbent, and therefore that no opportunity having been afforded to the incumbent to show cause against the issuing it, it was insufficient to ground the bishop's subsequent proceedings; and that the incumbent was entitled to recover from the sequestrators the profits of his benefice received by them as such:—Held, also, by two barons, that 57 *G.* 3. c. 99. s. 59. only applies to benefices where there is a plurality of churches and chapels. *The Honourable W. R. Capel, clerk*, v. *Child and another*, T. 1832. 689

## DAMAGES.

See *Ring* v. *Roxbrough* 468

Remittitur of, where judgment by default in debt on a (*remedial*) statute. See PARLIAMENT.

## DEED.

*(Construction of.)*

General words in a deed following particular words specifically describing and enumerating a certain house and closes, are controlled and limited thereby.

In 1816, *William M.* a tenant in tail, suffered a recovery, and stated in the deed to make a tenant to the præcipe his intention to cut off the entail of the capital mansion house, tenement, lands, &c. *thereinafter particularly mentioned.* He then described the property conveyed as "all those the capital mansion house, messuage or tenement, with the several out offices, gardens, plantations, and hereditaments

thereunto belonging, commonly called or known by the name of *Cefn Coch*, situate &c. and also eight fields" (stating their names) "*parts and parcels of the demesne lands of Cefn Coch*, together with all and singular houses, lands, &c. &c., hereditaments and appurtenances whatsoever to the said capital messuage, tenement, lands, hereditaments and premises appertaining, &c. or therewith set, let, &c." The *Cefn Coch* estate consisted of the mansion house with the above eight fields, and also of five other fields, containing about thirty-four acres, the property in dispute, as well as of a corn grist mill, called in a previous settlement of 1739, "*Melin y Cefn Coch*, with the lands thereto belonging," and a fulling mill. *Melin y Cefn Coch* was surrounded on three sides by the five fields in question, but the lands originally thereto belonging were only eleven acres. The whole *Cefn Coch* estate was cultivated by *Thomas M.* as tenant to *William M.* for many years before and after 1816, and new purchases of contiguous land made from time to time by *William M.* were also cultivated by *Thomas M.*

In 1824, *Thomas M.* suffered a recovery of premises described in the recovery deed as "all that water corn mill with the appurtenances called *Melin y Cefn Coch*, and the lands, &c. belonging thereto, called or known by the name of *Tyddyn y Felin Cefn Coch*," (i.e. the house of the mill of *Cefn Coch*,) and of the fulling mill and "all those five fields, closes or parcels of land or ground, part of *Tyddyn*, &c. aforesaid, situate &c. containing by estimation thirty-four acres or thereabout." In 1819, at the death of *William M.*, *Thomas M.* entered the rest of the premises, except the mansion house of *Cefn Coch* and the eight fields:—Held, that notwithstanding the general words in the deed of 1816, only the mansion house of *Cefn Coch* and the eight fields particularly described passed by that deed, and that the other five fields, part of *Tyddyn y Felin Cefn Coch*, passed by the deed of 1824. *Doe* d. *Ann Meyrick* v. *Mary Meyrick*; H. 1832. 178

Mistake in a deed in a statement of the then occupier of premises. See CHARITY.

Producing. See PRODUCING DEED.

## DEVISE.

See WILL.

## DISTRESS.

### (*Irregular.*)

When a distress is sold without the previous appraisement directed by 2 *W.* & *M.* sess. 1. c. 5. s. 2, the party distrained on can only recover the value of the goods *minus* the amount of rent due, but may recover the special damage sustained by such illegal sale. *Briggins* v. *Goode and others*, E. 1832, —447; *Notts* v. *Curtis*, 449, n. *S. P.*

Evidence in an action for excessive distress. *Digby* v. *Cure*, 264 n.

## DISTRINGAS.

A venire issued against a husband who was abroad for goods supplied to his wife in her separate trade was served at her house, and on the return a distringas issued, according to the practice of the Exchequer, to levy 40*s.* The levy was made on goods in the wife's house. The court set aside the service of the venire, and the distringas with costs. *Hitchcock* v. *Badham*, M. 1831. 159

The residence of the defendant must be stated in the affidavit for a distringas. *Bonsey and others* v. *Austen*, M. 1831. 164. *S. P.* next case.

At least three attempts to serve the defendant with the venire must appear. *Fisher* v. *Goodwin.* 164

Writ granted where defendant at home on two out of three times that the deponent called. *Hoblyn* v. *Simpson.* 165

So, where there were three calls, and facts showing that defendant avoided the service. *Latchman* v. *Cross.* *ib.*

So, where it was sworn that defendant had been seen in the neighbourhood. *Anonymous.* *ib.*

Since 7 & 8 *G.* 4. c. 71. the court will not increase issues on a distringas issued at common law, but will leave a plaintiff to proceed at his own risk according to the common law, supposing it still to exist. *Watson* v. *Locke*, H. 1832. 212

## DOWER.

Where in dower *unde nihil habet* it was suggested on the record by demandant, that her husband died seised of the tenements out of which she claimed her dower. but the jury only found that the husband had during his intermarriage been seised thereof in fee :—Held, in an action on a bond of indemnity, which the obligee (the tenant in the action of dower) might sustain by legal ouster from any part of the tenements, that damages and costs paid by him to the demandant could not be recovered on such bond. *Semble*, if a plea of tender in dower does not contain an averment that from the death of the husband, the tenant had always been ready and willing to render dower to demandant, she would not be deprived of her right to recover damages under stat. *Merton*, though she confessed the plea. *Jones* v. *Jones*, T. 1832. 531

In February 1816, a marriage was had between two minors by licence, and without consent of parents. After cohabiting till June 1816, the owner of the house where they lodged, compelled the husband to leave it for his misconduct. The husband never lived with his wife after, and died in October 1817. Shortly after they separated he on several occasions declared he never would live with her again, giving as one reason, that she was not his lawful wife. Some evidence was given that after the separation she had received small sums, which were ultimately allowed out of the rent of the husband's lands, but whether by his directions or not, did not distinctly appear :—Held, that these persons did not live together as man and wife till the man's death, so as to make the marriage valid within the retrospective effect of 3 *G.* 4. c. 75. s. 2. *Poole* v. *Poole and others*, M. 1831. 76

On the husband's death his devisees entered on his lands, and continued in possession till 3 *G.* 4. c. 75, passed, and for five years after, without claim of dower by the wife. *Semble*, had the marriage been rendered valid by s. 2, their possession would have been protected by 3 *G.* 4. c. 75. s. 6. *ib.*

## EJECTMENT.

Affidavit of service in ejectment must not qualify the possession of the tenants in possession, by stating service on them as executors. *Doe* v. *Roe*, M. 1831. 158

Rule nisi for judgment against the casual ejector refused, where the declaration had been accepted by an attorney not on the roll of the

court. *Doe* d. *Walker* v. *Roe*, E. 1832. 459

If notice to appear in ejectment be served in one term, judgment may be moved for against the casual ejector in the next term, being issuable. *Doe* v. *Roe*, T. 1832. 724

One rule for judgment against the casual ejector, though several tenants in possession had been served with ejectments. *Doe* v. *Roe*, T. 1832. 724

When an elegit creditor brings ejectment against a debtor, whose *primâ facie* title to the whole property sought to be recovered is proved, it is incumbent on other parties in possession as under-tenants, or otherwise, to show their better title, (*e. g.* by tenancy anterior to the judgment, or the like,) or the elegit creditor must recover. *Doe* d. *Evans and another*, v. *Owen and others*, M. 1831. 149

Service of declaration in ejectment on the wife who merely admits the receipt. *Doe* d. *Briggs* v. *Roe*, H. 1832. 211

Service of declaration in ejectment on persons not named therein as tenants in possession. *Doe* v. *Roe*, H. 1832. 280

Lease by mortgagee and executrix of mortgagor. Mortgagee demised, and the executrix of mortgagor demised and confirmed:—Held, that it operated as the demise of mortgagee, and the confirmation of the executrix of the mortgagor; and that a re-entry under a power reserved for that purpose "to them or either of them," enured to revest the former estate, and to give the legal estate to the mortgagee. Accordingly a count in ejectment for a forfeiture, laying the demise in the two jointly, was held not sustainable. *Doe* d. *Barney and others* v. *Adams*, H. 1832. 289

Leasehold was bequeathed to *A.* in trust to permit and suffer *B.*, the widow of testator, to have, take, and receive the rents during her life or widowhood, and on her death, or re-marriage, in trust to sell and divide the produce between *C.* and *D.* testator's sons. *A.* the trustee, *B.* the widow, and *C.* the son, join in a lease to *D.* for the residue of the term, he rendering rent to *B.* and *C.*, with power of re-entry to *A.*, *B.*, and *C.*, the survivor of them, and the executors of the survivor. The widow *B.* survived *A.*:—Held, that the legal estate in the leasehold vested in *A.* only, and therefore that the power of re-entry reserved to *B.* could not be exercised by her. *Doe* d. *Barker* v. *Goldsmith*, T. 1832. 710

## ELECTION OF M.P.

Where the committee of a candidate at an election, opened a public house for voters in his interests, and some supporters of his subsequently gave orders there, on their own credit, for refreshments to be supplied as well to certain voters for him, as to others who had no votes:—Held, that the case did not come within the treating act, 7 & 8 *W.* 3. c. 4. which provides against acts of treating done by the candidate, or some person acting for him and on his behalf, viz. by his desire or with his privity, in order to be elected. *Hughes* v. *Marshall and others*, M. 1831. 184

Giving refreshments to voters in order to procure an election is an offence at common law as bribery, and the party supplying them cannot recover. *ib.*

*Semble*, moderate and necessary refreshment may be furnished to voters coming from a distance. *ib.*

## ELEGIT.

See EJECTMENT.

## ENTRY, (RIGHT OF).

See EJECTMENT.

## ERROR.

A writ of error sued out on 27 *El.* c. 8, after 12th October, 1831, is *coram non judice*. *Gurney* v. *Gordon, in Error*, M. 1831. 16

After judgment in K. B. on writ of error from C. P., no writ of error lies to the new court of error erected by 11 *G.* 4, and 1 *W.* 4, c. 70. s. 8. *Ricketts* v. *Lewis, in Error*, M. 1831. 15

## ESTREATS.

Where the amount of estreats to be certified by clerks of the peace, town clerks, &c. to this court, is under 5*l.*, they may verify the return or certificate by affidavit without commission or personal appearance. *Ex parte Tomlins*, M. 1831. 176

## EVIDENCE.

(*Declarations of Auctioneers*, see AUCTION.)

Depositions taken before commissioners of bankrupt are conclusive evidence of the bankruptcy under 6 *Geo.* 4. c. 16, s. 92. though the conversion for which the assignees proceed shall have taken place after the act of bankruptcy; for the bankrupt might have sustained an action up to the time of issuing a commission, and if after that event the assignees should recover, payments to them by the defendant would be protected by s. 94, in case the commission should be afterwards superseded. *Fox, assignee of Swinercropp* v. *Mahony*, H. 1831. 285

(*Admissions.*)

To prove the defendant's admission of a debt due, the plaintiff produced a book containing a written entry signed by the defendant, but which, being couched in the terms of a promise to pay, was rejected for want of a stamp:—Held, that a verbal admission by the defendant of the amount of the debt due from him to the plaintiff, and made before, or cotemporaneously with his signing the entry, was properly admitted in evidence. *Singleton, executor*, v. *Ballot*, E. 1832. 409

## EXECUTION.

A plaintiff cannot act upon two concurrent writs of *ca. sa.* and *fi. fa.* at the same time. Thus where a *fi. fa.* and *ca. sa.* having issued together, a small sum only was obtained on levy under the former, and was swallowed up in the landlord's rent and expenses of execution, and before returning the *fi. fa.* the defendant was taken in execution under the *ca. sa.*; he was discharged out of custody. *Hodgkinson* v. *Walley*, M. 1831. 174

Irregularity in an execution in signing judgment and seizing goods, without delivering a copy of the bill of costs or giving a day's notice before taxing it, must be complained of promptly. Where ten days intervened between the seizure of the goods and the striking of a docket against the defendant without any step to set aside the execution, it was held that an application for that purpose after that time (the defendant's bankruptcy having intervened) was too late, and that the

irregularity, if any, was waived. *Rutledge* v. *Giles*, M. 1831. 169

## EXECUTOR AND ADMINISTRATOR.

Where the next of kin joined an administratrix in a mortgage of a term possessed by the intestate to secure payments of a debt due by the administratrix in her own right, on a false representation by recital in the deed that a pecuniary consideration had passed from the mortgagee to the administratrix, and in ejectment for the mortgaged premises the jury found a verdict for the defendants on the ground of fraud, the court refused to disturb the verdict. *Doe* v. *Fellows and others*, E. 1832. 460

One executor lent to his co-executor their testator's money, taking bond for the same, payable to himself and his executors. The lender died, and afterwards the borrower: —Held, 1st, that this was a misapplication of the assets, and therefore that the personal representatives of the lending executor might sue on the bond in order to exonerate their testator and themselves: 2dly, that the rule against circuity of action did not apply. *Gleadow and others, executors, &c.* v. *Atkins and another, executors, &c.* T. 1832. 593

## EXTENT IN AID.

After traverse of an extent in aid, the prosecutor and the defendant agreed to refer to arbitration the amount of the debt due to the former; and an award was made for payment of money by defendant to the prosecutor; before which, however, the defendant was discharged under an insolvent act, having inserted this debt in his schedule, the crown being no party to the reference; the award was set aside, and the insolvency was held to exonerate the defendant from liability to an attachment for not performing it. *Rex in aid of Hollis* v. *Bingham*, M. 1831. 46

## FRAUDS, (STATUTE OF).

*See* AUCTION—GUARANTEE.

A printed catalogue of sale contained, among others, this entry; —"Lot 6. Ten acres of spring wheat, on the further hill," with this memorandum at the foot, "the keep of all the fields will be sold with the lots." By the conditions of sale purchasers were to pay a deposit and give security for the payment of the remaining purchase money on the 17th of December next. At the sale the auctioneer verbally informed the persons present, among whom were the plaintiff and defendant, that lot 6 was not spring wheat, and that the keep had been sold by private contract. Plaintiff bought the lot and the auctioneer inserted his name in the sale book as purchaser. The plaintiff and defendant afterwards desired the auctioneer to set down the lot to the defendant as buyer, and to send in the account to him. The auctioneer thereupon wrote the defendant's initial, L. opposite to the lot in the sale book, and in the same line with the name of the plaintiff. Defendant asked if he should give security to pay for the crop on the 17th of December, according to the conditions of sale. The plaintiff waived taking it, but received the deposit from defendant. The crop was destroyed in a few days after the sale, and the defendant refused to pay the rest

of the purchase money:—Held, that as the auctioneer's declarations at the sale would not be evidence to vary the printed particulars, had an action been brought by the original seller against the plaintiff as buyer, so they would not be admissible in an action by him as seller under the original conditions of sale; and the court refused to set aside a nonsuit.

Keep, *e. g.* growing grass of fields, is an interest in land. *Shelton* v. *Livius*, E. 1832. 420

## FREE WARREN.

King *James* the First granted to Sir *R. T.* the king's manor and town of *A.*, the king's hundred of *A.*, with its rights and all other things to the said manor and hundred belonging, with a clause that he, his heirs and assigns, should for ever thereafter have free warren and free chase in all their *demesne* lands in the hundred, manor, town, tenements and hereditaments aforesaid, and in all other lands and woods being in the same hundred, manor, &c., although the same *demesne* lands and other lands or woods should lie within the king's forest. There was no recital of any intention to grant a right of free warren *de novo*:—Held, that the word *demesne* only applied to those lands of the manor which the lord, as such, either actually had or might have *propriis manibus;* and therefore that no right of free warren or free chase was conferred over the lands and woods of the crown, within the hundred, manor, &c. but only over the lands, &c. therein, which the grantee had as lord under the description of his demesne lands, and over any tenemental lands which he then held in fee, either of the king or of any lord within the limits mentioned in the grant. *Attorney General* v. *Parsons*. H. 1832. 223

## GUARANTEE.

A guarantee stipulated that *if the plaintiffs would give credit to A.* the defendants would be responsible that his payments should be regularly made:—Held, that the word "credit," did not mean the credit usually given by dealers in a particular trade, but a reasonable credit according to the terms on which the parties should agree to deal:—Held also, that this was a continuing guarantee within the period fixed. *Simpson* v. *Manley*, M. 1831. 86

A written guarantee by which defendant engaged to pay for all the gas which might be consumed at a theatre during the time it was occupied by *A.*, *and also* to pay for all arrears which might be then due, is void as to the arrears, for want of sufficient consideration apparent on the face of the instrument; but the amount due for gas supplied subsequently to the date of the guarantee, may be recovered under an *indebitatus* count for goods sold. *Ward* v. *Benson*, M. 1831. 93

## HARBOURING SMUGGLED GOODS.

See SMUGGLING.

## HEIR AND ANCESTOR.

In an action against an heir on the bond of his ancestor, for performance of covenants in another indenture, riens per descent was pleaded, and the plaintiff replied under 3 & 4 *W.* & *M.* c. 14., that the defendant had lands in fee-

simple by descent from his ancestor before the action commenced. The jury found a verdict for the plaintiff, and in pursuance of 3 *W.* & *M.* c. 14. s. 6., found the gross value of the lands descended. They then in assessing damages on the breaches of covenant, (according to 8 & 9 *W.* 3. c. 11. s. 8.) fixed the amount at a larger sum than the value of the lands descended:—Held, that execution for debt and costs could not be levied to a greater amount than the value of the lands descended. *Brown* v. *Shuker, and others,* H. 1832. 320

## HUSBAND AND WIFE.

A wife was possessed of authority from her husband, a paper-maker, to give in his absence certain requisite excise notices and receipts, without which paper could not legally be removed from the mill, though the making it might continue. She had also paid excise duty by his authority. But it did not appear that she had any other authority from him respecting the manufacture, or to remove paper at all. She afterwards removed paper in an illegal manner and pledged it, stating that she wished to make up a sum to pay duty with. The husband having been proceeded against for such removal:—Held, that her former acts were evidence to be left to the jury to decide whether or not the illegal act was done by his authority. *Attorney-General* v. *Riddell,* T. 1832. 523

## IMPARLANCE.

See PLEADING, (*Demurrer.*)

## INSOLVENCY.

See EXTENT IN AID.

## INSURANCE.

Insurance on ship and on body, &c. boat and other furniture of ship, free of average on ship under 3*l.* per cent. except general. A boat slung on the davits on the quarter was lost at sea, and another average loss occurred by stranding. Both losses taken together exceeded 3*l.* per cent., but neither taken singly reached that amount:—Held, that parol evidence of usage of underwriters not to pay for losses of boats so slung was inadmissible, and that average losses individually less than 3*l.* per cent., but exceeding that sum if taken together, might be joined so as to charge the assurers on the memorandum. *Blackett* v. *The Royal Exchange Assurance Company,* H. 1831. 266

## INTEREST.

See LIMITATIONS.

## INTERPLEADER.

See SHERIFF.

## IRREGULARITY.

See PRACTICE, (*Irregularity.*)

## JUDGE'S ORDER.

See JUDGMENT AS IN CASE OF NONSUIT.

## JUDGMENT.

See SCIRE FACIAS.

## JUDGMENT AS IN CASE OF NONSUIT.

After a new trial granted, the defendant took the record down by proviso. On motion by the plaintiff,

an order was made by the judge at the assizes to put off the trial for the absence of a material witness, on the plaintiff's undertaking to enter the cause for trial at the next assizes. The court granted judgment as in case of a nonsuit, for not proceeding to trial at the latter assizes, though the judge's order had not been made a rule of court. *Jones* v. *Pritchard*, E. 1832. 383

Before Reg. H. & W. 4. Reg. 1. s. 58, four days' notice of motion for judgment as in case of nonsuit must have been given in Exchequer, but there was no rule to enter the issue as in the King's Bench. *Coaltsworth* v. *Martin*, M. 1831. 169

In affidavit for judgment as in case of nonsuit, it must be directly sworn that the cause was at issue in the proper term. *Smith* v. *Parslow*, H. 1831. 284

Docketing the issue without docketing the judgment, and the debt, damages, and costs recovered thereby, is not a sufficient docketing a judgment within 4 & 5 *W.* & *M.* c. 20. Therefore where a committee of a lunatic, against whom a judgment had been obtained but not duly docketed, paid over rents to a mortgagee of a date subsequent to the judgment, it was held, that he was not liable as for money had and received to the use of the plaintiff, who claimed as tenant by elegit under the judgment; for it was his first duty as committee to keep down the interest on the mortgage. *Braithwaite and another*, assignees of *Urpwood*, a bankrupt, v. *Watts*, H. 1832. 293

See COSTS OF THE DAY.

## JUROR.

See TRIAL.

## LEGACY DUTY.

A testator devised hereditaments to *R. J.* & *W. J.* and their heirs, to hold to their use during the life of *C. T.*, and declared that after the death of *C. T.* they and their heirs should stand seised to the use and intent that *J. T.* should, during his life, receive out of the said hereditaments, and the rents thereof, an annuity or clear yearly rent charge of £500, payable quarterly, the first payment to be made on such quarter day as should next happen after the death of *C. T.*, with power of distress and entry, subject to which annuity he gave one moiety of the hereditaments in fee to *R. J.*, and the other for life to *W. J.*:—Held, that this was a "gift by way of annuity out of or charged on real estate," subject to legacy duty by 55 *G.* 3. c. 184. sched. part 3, and to be paid in the first instance by *R. J.* and *W. J.* *Attorney General* v. *Jackson and another*, M. 1831. 50

A testator born in Scotland, but having resided many years in India as a surgeon of one of the king's regiments, died there, leaving real and personal property situated in India, but no assets in England. By his will and testamentary papers, he left the whole of his property, in equal divisions, to his four natural children, or the survivors of them and their heirs, subject to some small legacies and annuities. His executors having obtained an Indian probate paid the debts and bequests, and converted the principal part of the estate into money, which they sent to their bankers in England, and invested it in the funds in their own names. Proceedings in equity were afterwards commenced against them in England to determine the claims of the residuary legatees,

all the testator's children having died. The stock was transferred into the name of the accountant-general of the court of Chancery, and the court made a decree ascertaining the shares of the several claimants:—Held, that legacy duty was not payable on the legacies, annuities, or shares of residue bequeathed. *Jackson* v. *Forbes*, E. 1832. 354

A testator being a subject of the United States and resident there, at his death appointed executors being British subjects, living in Great Britain, and bequeathed legacies to British subjects resident at home and in India, and to Americans. The legacies to the residents in India and America were paid abroad from the testator's assets in those countries, and the surplus assets, which ultimately became available for the payment of the legatees in Great Britain, being partly in the British funds and partly remitted here from India, were placed in the Bank of England, in the name of the accountant-general, to the credit of a suit in Chancery, commenced by the British legatees:—Held, that the testator not being a British subject, his personalty wherever situate was foreign, and that his legacies were not liable to legacy duty. *In re estate and effects of Charles Key Bruce, deceased*, T. 1832. 475

## LETTER.

See VENUE.

## LIMITATIONS, STATUTE OF.

A payment made within six years of interest which had become due upon a note more than six years ago, is sufficient to take the case out of the statute of limitations, where the note remains in the hands of the payee—such a payment is within the proviso in 9 *G.* 4, c. 14. s. 1. and is therefore not affected by that act. *Bealey* v. *Greenslade*, M. 1831. 121

## MATERIAL EVIDENCE.

See VENUE.

## MISNOMER.

A party arrested as *William Henry Maxwell* will not be discharged out of custody on filing common bail, on the ground that his real name is *William Hamilton Maxwell*, when plaintiff swears that defendant was known to him for five years by the name of *William Henry*, and had told him that was his name, and had signed an agreement with other parties in which he was described as *William Henry*, thus: *W. H. Maxwell*. *Weston* v. *Maxwell*, H. 1832, (and see Reg. Gen. H. 2 *W.* 4, Reg. 1. s. 32.) 278

## MORTGAGE.

See SHIPS.

## NEW TRIAL AND NONSUIT.

Where an action is brought for less than £20, and no leave to move, or misdirection have occurred, the court will not grant a new trial, though the verdict be for defendant. *Young, Gent.* v. *Harris*, M. 1831. 167

Submission to the opinion of a judge declared by him at the trial to be for a nonsuit, does not estop a motion for a new trial if his opinion be incorrect. *Alexander* v. *Barker*, M. 1831. 140

After right of way ill pleaded. See PLEADING.

The rejection of evidence, which if admitted would not alter the case, or establish any fact not already proved by other means, is not a ground for a new trial. *Alexander* v. *Barker*, M. 1831. 140

## NOTICE OF TRIAL.

Two clear days' notice must be given exclusive of an intervening Sunday. *Grojean* v. *Manning*, T. 1832. 725

## PARLIAMENT.

See ELECTION.

Costs incurred by opposing a petition against the return of a member to parliament may be recovered under 9 *G.* 4. c. 22. s. 57. and s. 63. against one of two persons who have signed it. *Remittitur* of damages where judgment was by default in debt on a *remedial* statute. *Gurney* v. *Gordon and another*, (*in Error*,) T. 1832. 616

## PARTICULARS OF DEMAND.

If a particular of demand, stating dates and items fully, exceed three folios, and plaintiff gives notice to defendant accordingly under *Reg. Gen.* Trin. 1 *W.* 4, the court will order a full particular to be delivered to defendant on payment of costs and taking short notice of trial, if necessary, though he may have had full particulars before the action was brought. *James, Gent.* v. *Child*, H. 1832. 302

Particulars of demand having been delivered to the defendant's attorney under a judge's order, another bill of particulars was afterwards annexed to the record by the plaintiff's attorney, pursuant to Reg. Gen. Trin. 1 *W.* 4, as and for a copy of the particulars of demand, but in fact containing items not stated in the particulars delivered to the defendant. The plaintiff's evidence at the trial was confined to the items exclusively set forth in the particular annexed to the record. The defendant's counsel not being prepared to prove the delivery of the particulars to the defendant's attorney under the judge's order, did not apply for a nonsuit. The court granted a new trial, without costs, but refused to enter a nonsuit. *Morgan* v. *Harris*, E. 1832. 385

The plaintiff having a claim against the defendant for rent, and also for stone taken from a quarry, declared against him in debt for use and occupation, with a count for money had and received. By the particulars delivered it appeared that the plaintiff sought to recover a stated sum for the value of certain described quantities of stone. Before the trial the plaintiff commenced another action against the defendant in case for improperly quarrying stone, with a count in trover for stone, and delivered particulars claiming the same sum as before for similar quantities of stone. At the first trial the plaintiff confined his evidence to the claim for rent, and obtained a general verdict. At the second trial he had a verdict for the value of the stone taken away:—Held, that the plaintiff having distinct demands against the defendant, one of which was not advanced by him at the trial of the first action, the tort was not thereby waived, and consequently that the second action was not barred by any former recovery. *Hadley* v. *Green*, E. 1832. 390

## PARTNER.

See PLEADING.

## PAYMENT OF MONEY INTO COURT.

Where money has been paid into court in pursuance of 43 *G.* 3. c. 46. and 7 & 8 *G.* 4. c. 71. in lieu of putting in bail below and perfecting bail above, and plaintiff becomes entitled to take it out by having obtained a verdict, he can only issue execution for any surplus which he may have recovered. *Hews* v. *Pyke*, H. 1832. 313

## PERPETUITIES.

By a marriage settlement certain premises were conveyed to trustees to the use of the husband and his assigns for life, remainder to trustees to preserve contingent remainders during his life, and after his death that the wife, if surviving, should receive the yearly charge of 25*l.* for her life, and subject thereto to the use of all or such one or more, (exclusively of the other or others of the children *or remoter issue* of the tenant for life by his wife,) as the tenant for life and his wife should jointly appoint, or in default of such joint appointment as the survivor should appoint. Power of sale by the trustees *for the time being*, with the consent in writing of the tenant for life and his wife or of the survivor, and after the decease of such survivor, *at the discretion of the trustees or trustee for the time being*. A subsequent clause provided for a change of trustees. The tenant for life and his wife joined with the trustees in a contract of sale and conveyance under the above power:—Held, that they could make a good title to the purchaser, notwithstanding the rule against perpetuites. *Boyce and others* v. *Hanning and others*, H. 1832. 327

## PETITION.

See PARLIAMENT.

## PLEADING.

See ARBITRATION AND AWARD—SMUGGLING.

Where it was stated in pleading that certain persons were seised as of fee of premises, and used the same as a school-house, and for the residence of the schoolmaster thereof, and that they being so seised appointed a schoolmaster:—Held, that no objection arose on producing a deed showing them to be seised in trust only, and limiting the nature of the appointment and mode of dismissal of a schoolmaster; and that the occupation by him was incident to his appointment as long as that legally continued. *Wilkinson* v. *Malin*, T. 1832. 544

An appointment to the situation of schoolmaster under a conveyance to charitable uses may be made without writing. *ib.*

A replication to a plea of *liberum tenementum* stated, that the premises in question were the soil and freehold of the persons named in the plea as trustees of a charitable fund, and in no other right whatever; that the premises were used by the persons named as such trustees for a schoolhouse, and for the residence of the schoolmaster. That long before the said times when &c. a schoolmaster was duly appointed by *the then trustees* of the said charitable fund upon certain terms. Thus no seisin, or seisin in fee of the trustees who appointed the plaintiff was stated, nor were they named; no power entitling them to make the appointment was set out, nor

were the trusts of the charitable fund, or the deed creating them, stated:—Held, cured by verdict; *Wilkinson* v. *Malin*, T. 1832. 544

A plea of right of way described the line of way incorrectly, and plaintiff had a verdict. The court refused a rule for a new trial in order to enable defendant to amend, though moved on payment of costs, and on affidavit of surprise. *Edwards* v. *Broxon*, M. 1831. 163

Where several distinct causes of action, one of which is not sustainable, are stated in one count in assumpsit, general damages may be given. *Ring* v. *Roxbrough*, E. 1832. 468

Averment of a promise under a Whereas is good on general demurrer. *ib.*

Where the promise is laid to pay on request the *licet sæpius requisitus* need not be laid or proved. *ib.*

*(Joinder of plaintiffs.)*

Defendant applied for a loan of money to *D. A.* who was a partner with several others in a banking house. Nothing passed at the time of negociating for the loan, to exclude the firm from making it. The advance was afterwards made out of the partnership funds:—Held, that the other partners were properly joined with *D. A.* in suing for money lent. *Alexander* v. *Barker*, M. 1831. 140

The declaration by an administratrix stated a debt to the intestate and a promise to pay him in his lifetime, laying the day on 2d Jan. 1832. The letters of administration were afterwards stated to have been granted to the plaintiff after the intestate's death, to wit, on the 11th Jan. 1831:—Held, on special demurrer, that this date was repugnant and inconsistent, and that if it could be rejected the declaration would be bad for want of alleging the day on which a material fact had taken place. *Ring* v. *Roxbrough*, E. 1832. 468

*(Demurrer.)*

A special demurrer is in nature of plea in bar, and may therefore be had after a general imparlance.

The court will not grant a rule authorizing a plaintiff to sign judgment for irregularity, but will leave him to take that step at his own peril. *Thynne* v. *Woodman*, E. 1832. 492

*Quære*, if counsel's signature is necessary to joinder in demurrer.

A party to whom a demurrer book is delivered cannot sign judgment while he retains it. *S. C.*

*(Slander.)*

In a declaration for slanderous words, the stating an immaterial fact in the inducement does not render it necessary to be proved, if the words themselves support the imputation complained of. *Cox* v. *Thomason*, E. 1832. 411

By Reg. Gen. Hil. 2 *W.* 4, No. 74, a defendant is entitled to deduct the costs of issues on counts found for him from the plaintiff's costs on the other counts, whether the general issue be pleaded to the whole declaration, or whether issues are joined on several pleas. *ib.*

Taxation of costs incurred before the first day of Easter Term 1832, is governed by Reg. Gen. Hil. 2 *W.* 4, No. 74, though it is not had till after that day. *ib.*

POST.

See VENUE.

## PRACTICE.

*(Affidavit to hold to bail.)*

See that title.

*(Process and service.)*

If one of several defendants is abroad, the court will not order that service of process on his wife shall be good, or restrain the other defendant from pleading in abatement in an action ex contractu. *Davis* v. *Morgan and others*, H. 1832. 288

See note Reg. Gen. T. 2 *W.* 4.

The copy of a *quo minus* served on defendant, purported to be directed to the sheriff of *London*. Further it contained no signature by the clerk of the pleas, and the notice to appear was for an impossible day, viz. a day in *January* 1831, the service having taken place in *December* 1831:—Held, that the service should not be set aside; for the sheriffs of *London* and *Middlesex* are but one officer; the signature of the clerk of the pleas is no part of the writ, and the defendant could not be misled by the day named for appearance. *Clutterbuck* v. *Wildman*, H. 1832. 276

The notice at foot of serviceable process must contain the name of the defendant as well as the writ, therefore where the writ named the defendant as Christopher *Hooper*, and the notice subjoined was directed to Christopher *Wood*, the service of the writ was set aside with costs. *Wright* v. *Hooper*, H. 1832. 283

*(Security for costs.)*

It is not too late to move for security for costs after order granted for time to plead, but before plea. *Wilson* v. *Minchin*, M. 1831. 166

Rule for security for costs discharged on its appearing that one of the two plaintiffs resided in this country. *Anon.* M. 1831. 167, *n.*

A rule nisi for security for costs may be obtained without affidavit of previous application for it to the plaintiff's attorney or agent, but cannot then operate as a stay of proceedings. Or *semble* without notice of motion.

A defendant makes such a motion at his peril, if it should be too late; therefore he need not state how far the proceedings have gone, and it is for the plaintiff to show that the motion is not in time. *Jones* v. *Jones*, H. 1832. 216

*(Irregularity.)*

If after rule obtained to set aside proceedings for irregularity, the other party offers to waive proceedings and pay the costs of the rule nisi, costs incurred subsequently to the offer must fall on the side which does not accept it. *Hatton* v. *Stocking*, M. 1831. 165

Process on which the day of the month and year are not indorsed pursuant to Reg. Gen. Mich. 1 *W.* 4, will not be set aside on that account, that rule being merely directory. *Miller* v. *Bowden*, T. 1831. 112

Service of bailable process set aside for irregularity in not having stated the name of the attorney immediately retained by the plaintiff, pursuant to 2 *G.* 2. c. 23. s. 23. *Sheppard*, assignee, v. *Shum*, T. 1832. 742

A plea delivered after the time for pleading expired but before judgment has been actually signed, is regular; thus where a plea was so delivered, and plaintiff's attorney was informed thereof, but afterwards signed judgment notwithstanding, it was set aside, with costs to be paid by him. *Amphlitt* v. *Semple*, H. 1832. 312

A cognovit dated the 3d *November*, was signed by two of three defend-

ants on the 4th, and by the third on the 7th. The plaintiff's demand was to be paid by weekly instalments, the first being payable on the 5th, the plaintiff had power to enter up judgment, and issue execution for the whole upon default in payment of any one instalment; the first instalment not being paid on the 5th was paid on the 8th to the clerk of the plaintiff's attorney. Judgment had been signed on the 7th. After notice of the payment, plaintiff's attorney on the 8th gave notice of taxing costs for the 9th, but one of the defendants obtained a postponement. On the 10th at ten o'clock A.M. a notice of taxation of costs at two o'clock that day, was received at the defendant's house in London. The defendant's attorney went to the master's office at two, but ultimately failed to attend at three when the costs were taxed.

Held, that the judgment and execution against all three defendants were regular, and that the execution of the cognovit by one of them on the 7th, related back to the 3d, the date of the cognovit.

Also that the acceptance of the instalments by the clerk did not waive the default of payment on the 5th, there being no proof of the clerk's authority to receive the money, or of any waiver by plaintiff's attorney when informed of the receipt.

Also, that under the circumstances of the first postponement, a full day's notice of taxation was not necessary in order to tax the costs on the 10th.

*Semble*, the neglect to give one day's notice to tax costs, does not *ipso facto* avoid the judgment and execution for debt and costs, the rule of court being directory only. *Perry* v. *Turner*, M. 1831. 128

(*Cognovit.*)

A cognovit may be given after process sued out, and before it is served. *Kirbey* v. *Jenkins*, E. 1832. 499

Judgment and execution on a cognovit embodying a matter of agreement of 20*l.* value, were set aside with costs, for want of a stamp on the cognovit; but it was suffered to remain on the file, and having been afterwards stamped, fresh judgment and execution issued on it, and the interlocutory costs given to defendant, on the rule for setting aside the former judgment and execution, were set off against the final costs in the cause. *Pitman* v. *Humfrey*, E. 1832. 500

The pleading a plea before appearance, but within the number of days allowed for pleading, is not such an irregularity as entitles plaintiff to sign judgment before the time for pleading is out. *Nolleken* v. *Severner*, H. 1832. 304

(*Staying proceedings.*)

A plaintiff paid into court a sum under 40*s.* as a balance of account, under a rule for staying proceedings on so doing. The rule directed the plaintiff to tax the costs, but the clause that defendant should pay them was struck out, in order that as the cause of action appeared to be under 40*s.*, and arose within the jurisdiction of the county court of the county where the defendant resided, the question of costs might be afterwards discussed. The plaintiff taxed the costs and demanded them from defendant at a time when the judges were absent from *London*. Defendant refused to pay then, but offered to give a judgment for them for the 4th day of the next term. Plaintiff proceeded to trial, having refused

to acquaint defendant whether he went for a further balance or not, and recovered 1*s.* damages. The court stayed the proceedings with costs. *Jones*, assignee of *Thomas* v. *Owen*, E. 1832. 452

*(Rejoinder.)*

By the terms of "rejoining gratis" is meant not only a dispensing with the rule to rejoin, but also with the time given by it, so that the defendant must rejoin within twenty-four hours after demand of rejoinder. *Clarke* v. *Adams*, T. 1832. 755

PRINTING.

Plaintiff, who had been the proprietor of a newspaper, agreed with the defendants that they should become the proprietors. He afterwards printed it for them, and paid part of the editor's salary. He made an affidavit pursuant to 38 *G.* 3. c. 78. s. 1 & 2. stating himself to be printer "and sole proprietor" of the paper:—Held, that he could not recover against the defendants for printing it, or for any other act done by him to further its sale during the time to which the defective affidavit extended. *Stephens* v. *Robinson and another*, H. 1832. 280

PRISONER.

See BAIL.

*Davis* v. *Grey*. 276

PRODUCING DEEDS AND INSTRUMENTS.

Where two parts of a contract originally existed, one of which was held by each party, and one part is afterwards lost, the court will order the other to be produced at the stamp office in order to its being stamped, though not held in trust for the applicant. *Neale* v. *Swind*, H. 1832. 318

Where two parts of an agreement by a tenant with her landlord to keep premises in repair had existed, mutually signed by both parties, of which the reversioner had one: Held, that his assignee suing for breach of the agreement could not compel the tenant to produce his copy in order to its being stamped, for he should have applied to the assignor through whom he claimed, or have shown that he could not be found.

*Semble*, that if the only part which existed had been destroyed in order to evade an order of court for its production by the party to the cause called on to produce it, he might be attached, and a copy ordered to be stamped; but *quære*. *Travis* v. *Collins*, T. 1832. 726

RECOGNIZANCES.

Practice on moving for relief against forfeited recognizances. *Ex parte Dunk*, E. 1832. 500

REGISTRY OF SHIPS.

See SHIPS.

REGULÆ GENERALES.

*Michaelmas Term*, 1831. 168
*Hilary Term*, 1832. 353
*Easter Term*, ——. 502
*Trinity Term*, ——. 761

(*Construction of.* See PRACTICE.)

REJOINING GRATIS.

See PRACTICE (*Rejoinder.*)

## REPLEVIN.

Replevin for taking goods and standing corn. Cognizance, that by deed of 25th *September* 1806, *A.* (*Taylor*) granted to *B.* (*Hodgson*) an annuity charged on the premises, with power to enter and distrain for arrears, and the distresses "to detain, manage, sell, and dispose of in the manner in all respects as distresses for rents reserved on leases for years;" and that *C.* (*Miller*, the defendant below,) as *B.*'s bailiff, entered and distrained for arrears of that annuity. Plea in bar, that by [previous] deed of 7th *May* 1806, *A.* granted to *D.* (*Walton*) an annuity charged on the [same] premises; and for better securing the payment, granted, sold, and demised them to *E.* (*Fletcher*) for 99 years, with power of distress; and that arrears had accrued and were due: —Held, 1st. That as no entry appeared by *E.* the first grantee, or by any person in privity with him, after the demise of 7th *May* 1806, no estate vested in him at common law by that deed. 2dly. That as no election appeared by *E.*, the first grantor, to take under that deed as a bargain and sale, pursuant to the statute of uses, and as *F.* (*Green*, the plaintiff in replevin,) was not shown to be other than a stranger to that deed, the court could not at his request make that election for *E.* which would defeat the distress by *B.* under the subsequent deed of 25th *September* 1806. 3dly. That standing crops could not be distrained under the clause in the deed of 25th *September* 1806. Judgment entered for the plaintiff below, for damages for taking the standing crops, and the defendant below for a return of the cattle and other goods distrained. *Miller* v. *Green* (*in error*). M. 1831. 1

## REQUESTS.

See Court of Requests.

## SCHOOLMASTER.

See Charity.

## SECURITY FOR COSTS.

See Practice.

## SCIRE FACIAS.

A rule moved on 8 & 9 *W.* 3. c. 11. s. 6. against an executor for a *sci. fa.* to show cause why damages should not be assessed and recovered on an interlocutory judgment signed twenty years ago against the defendant, his testator, who had since died, is a rule nisi only. *Brown* v. *Evans*, E. 1832. 389

## SHERIFF.

In an action upon 23 *H.* 6. c. 9. against a sheriff for extortion, his connection with the act of his bailiff is sufficiently established by producing the examined copy of a writ returned with the name of a sheriff's bailiff indorsed, and proving that process was executed by a bailiff of the same name, and that it is the practice of the sheriff's office to indorse on the writ the name of the bailiff to whom the warrant to arrest is delivered, or to adopt any such indorsement of a bailiff's name made on the writ by the plaintiff's attorney. *Scott*, *qui tam*, v. *Marshall and another*, Sheriff of Middlesex, H. 1832. 257

*Quære*, whether 23 *H.* 6. c. 9. be repealed by 32 *G.* 2. c. 28. and whether, if it is not, the sheriff is liable for extortion committed by the bailiff for his own benefit? *ib.*

Goods were seized and sold under a *fi. fa.* by a chief bailiff of a fran-

chise, having sole execution of writs therein, after an act of bankruptcy committed by the defendant, but without knowledge thereof, and before the commission issued:—Held, that trover would not lie by the assignees against the chief bailiff, though the property in the goods vested in them by relation to the act of bankruptcy. *Secus* as to the deputy bailiff, who had taken indemnity from the judgment creditors. *Balme* v. *Hutton*, M. 1831. 17

Reversed in error, H. 1833. 619

Where, in a case of a claim by assignees to goods taken by a sheriff under an execution, a sheriff obtains the benefit of the adverse claim act, 1 & 2 *W.* 4. c. 58. s. 6. by a rule calling on the plaintiffs in the action and the assignees to appear and maintain or relinquish their claims thereto, *semble*, the costs of necessary possession by the sheriff will not be allowed; but he will be suffered to withdraw from possession if the plaintiffs do not appear to the rule. *Field and others* v. *Cope*, E. 1832. 458

*Qu.* If the court has power to award such costs? *ib.*

## SHIPS.

By the register act, 6 *G.* 4. c. 110. s. 39. the officers of customs are directed not to register bills of sale of ships, which at the time they are mortgaged are absent from port, till thirty days have elapsed from their arrival in port. Two ships and 16-64th parts or shares of a third were mortgaged while at sea by bill of sale to *W.* and Co., which bill of sale was registered by the officers of customs of the port to which they belonged, before their return to port. One ship afterwards returned, but no indorsement of the bill of sale was made on her certificate of registry. After being insured, she sailed again within thirty days on another voyage, in which she was lost. By a bill of sale of a subsequent date, (to which *W.* and Co. were parties,) after reciting the prior mortgage to them, the same mortgagor assigned to *J.* and Co. the same ships and shares, with the policies effected on two of them, and the sum payable by certain charterers for the hire of the third, with all his equity of redemption in the said ships, freight, monies, and premises, subject to the prior mortgage to *W.* and Co. and to their power of sale. This bill of sale was also registered before the return of any of the ships to port. The mortgagor became bankrupt. Two of the ships returned, and their certificates of registry were duly indorsed within thirty days, with the two bills of sale in the order of their dates:—Held, that the second bill of sale was valid under 6 *G.* 4. c. 110. ss. 31. and 37. against the assignees of the bankrupt, as to the interests in the ships which it purported to assign to the mortgagees; notwithstanding the mortgagor's bankruptcy occurred before the lapse of thirty days after the ship arrived in port. So also as to the policies of insurance and monies due on the charter party. *Ex parte Jones and another in the matter of Richardson, a bankrupt*, T. 1832. 671

A ship was mortgaged, with power of sale, in order to repayment of a sum lent on that security. She afterwards sailed from England to the West Indies, and returned to the Thames with a cargo. At Gravesend, near the end of the voyage, she was taken possession of by the mortgagee:—Held, that the accruing freight on the inward cargo belonged to the mortgagee

as incident to the property in the ship, notwithstanding the register act 6 *G.* 4. c. 110. s. 45. which provides against the mortgagee being deemed an owner, except as far as may be necessary to obtain payment of his debt. *Kerswill* v. *Bishop*, T. 1832. 602

## SMUGGLING. See PLEADING.

Information under 6 *G.* 4. c. 108. s. 45. for penalties for harbouring foreign spirits and tobacco, *liable to payment of duty on importation*, and which had been imported, the duties not having been first paid or secured. The jury found that the goods were imported in smaller packages and casks than allowed by law, and not in order to be warehoused; also, that the defendants harboured them, knowing the duties thereon not to have been paid:—Held, upon the construction of 6 *G.* 4. c. 107. s. 52. and s. 128, that they were goods prohibited to be imported, and were therefore improperly described in the information. *Attorney General* v. *Key, and others, (in Error)* M. 1831. 65

## STATUTES CITED, &c.

*H.* 3. (Statute Merton, Dower.) *Jones* v. *Jones.* 531
22 *H.* 6. c. 9. (Extortion.) *Scott* v. *Marshall.* 257
27 *El.* c. 8. (Error.) *Gurney* v. *Gordon.* 16
29 *C.* 2. c. 3. (Statute Frauds.) 420
3 & 4 *W.* & *M.* c. 14. (Heir and Ancestor.) *Brown* v. *Shuker and others.* 320
4 & 5 *W.* & *M.* c. 20. (Docketing Judgment.) *Braithwaite* v. *Watts.* 293
7 & 8 *W.* 3. c. 4. (Treating Act.) *Hughes* v. *Marshall and others.* 184
8 & 9 *W.* 3. c. 11. See SCIRE FACIAS.
4 & 5 *Ann.* c. 16. s. 11. (Plea in Abatement.) See ABATEMENT.
2 *G.* 2. c. 23. s. 23. (Taxing Attorney's bill.) *James* v. *Child.* 402, 742
32 *G.* 2. c. 28. (Sheriff) *Scott* v. *Marshall.* 257
3 *G.* 3. c. 19. (Bradford, &c. Court of Requests.) 503
43 *G.* 3. c. 46. s. 3. (Arrest—Costs.) 753
45 *G.* 3. c. 67. (Bath Court of Requests.) *Graham* v. *Brown.* 309
47 *G.* 3. sess. 2. c. xxxix. (Court of Requests.) *Drews* v. *Coles.* 503
55 *G.* 3. c. 184. (Schedule, Part 3, Legacy Duty.) See LEGACY DUTY.
3 *G.* 4. c. 75. (Marriage Act.) *Poole* v. *Poole.* 76
6 *G.* 4. c. 16. (Bankruptcy.) *Fox* v. *Mahony.* 285
7 & 8 *G.* 4. c. 71. (Distringas.) See DISTRINGAS.
9 *G.* 4. c. 14. (Limitations.) *Beaky* v. *Greenslade.* 121
9 *G.* 4. c. 22. s. 57. (Costs on Petitions.) *Gurney* v. *Gordon.* 616
11 *G.* 4. & 1 *W.* 4. c. 70. s. 8. (Error.) *Gurney* v. *Gordon.* 16
1 & 2 *W.* 4. c. 58. s. 6. (Adverse Claim, or Interpleader Act.) See SHERIFF.

## STAYING PROCEEDINGS.

See PRACTICE.

## STOPPAGE IN TRANSITU.

Goods were sent by water carriage, and deposited in the carrier's warehouse at the end of the voyage in the usual course of business between him and the consignee, viz. to be delivered out to him or his customers as they should be wanted, without being sent to his residence elsewhere:—Held, that the transitus was determined, and that the vendor's right to stop in transitu was gone, though he claimed as such a lien on the goods against the consignee. *Allen and another*, v. *Gripper and another*, H. 1832. 217

## SUNDAY INTERVENING.

See *Grojean* v. *Manning*. 725

## TENDER.

A tender in local bank notes is good, if the creditor does not at the time object to their character as such, but insists on a larger amount being due. *Polglase* v. *Oliver*, M. 1831. 89

## TERM FEE.

A term fee of 3*s*. 4*d*. is payable to a clerk in court in a revenue prosecution at suit of the attorney-general, though only a subpœna ad respondendum has issued, and no information has preceded, or subsequent step has taken place. *Attorney-General* v. *Munday*, H. 1832. 305

## TRIAL.

See Nonsuit and New Trial—Notice of Trial.

Where a first trial became fruitless, by the absconding of a juror, before an effectual verdict was returned, and the plaintiff obtained a verdict on a second trial:—Held, that the defendant must pay the costs of the first trial. *Harrison* v. *Bennett*, T. 1832. 740

## USE AND OCCUPATION.

Counts for use and occupation and money had and received, are sustainable where the defendant has received rents and obtained attornments from tenants in possession, under an executory contract for a lease to be executed to him by the plaintiff at a rent and from a period to be afterwards ascertained. *Neale* v. *Sweeney*, E. 1832. 464

## VENUE.

The venue will not be changed in an action on a specialty on the ground that the cause of action arose in a different county, and that both parties and all the witnesses resided there, unless on affidavit of merits, and that it would be necessary to call witnesses resident in the latter county. *Lancaster* v. *South*, E. 1832. 501

In no case whatever can defendant change the venue after having obtained an order for time to plead, expressed to be granted "on the usual terms," but he may introduce a condition in the order to enable him to move for that purpose. Therefore, where a rule to change the venue had been obtained by the defendant in a country cause, against which it was shown for cause that time to plead had been granted by a judge's order "on the usual terms:" the court amended the order on payment of costs, and changed the venue; for the judgment would not be delayed. *Notts* v. *Curtis*, H. 1832. 307

The putting into the post a letter in the county where goods were made, directed to *A*. in another county, and containing an invoice of the quantity, quality, and price of goods sent at the same date to *A*. by a another conveyance, is material evidence in the first county, so as to satisfy an undertaking by the plaintiff to give material evidence there. *Linley* v. *Bates*, T. 1832. 746

## WARRANT OF ATTORNEY.

The subscribing witness to a warrant of attorney must make affidavit of the execution; and his signing the jurat of the affidavit as the commissioner before whom it is sworn, is not sufficient. *Field* v. *Beacroft*, H. 1832. 283

## WATER-COURSE.

Water flowing over a close primâ

facie passes with it by a conveyance of the land, and uninterrupted appropriation of such water for less than 20 years gains a title to it, so as to sustain an action for its diversion. *Canham* v. *Fisk*, M. 1831. 155

Indictment for a nuisance to a public canal navigation, established by statute in 1763. Special verdict, that the canal was carried across a river and the adjoining valley by means of an aqueduct and embankment, in which latter were several arches and culverts: That a brook fell into the river above its point of intersection with the canal; and that in time of flood the water which was then penned back into the brook overflowed its banks, and was carried by the natural level of the country to the above-mentioned arches, and through them to the river, doing much damage to the lands over which it passed: That, except for the artificial embankments called fenders, after mentioned, the arches in the aqueduct would be sufficiently wide for the passage of the river at all times but those of high flood, notwithstanding the increase of water by improved drainage of the country: That the defendants, occupiers of lands adjoining the river and brook, had, since the making the canal, aqueduct and embankment, heightened certain fenders, constructed from time to time as occasion required on their respective lands, so as to prevent the flood-water from escaping over them: and that the water had consequently in time of flood come down in so large a body against the aqueduct and canal banks as to endanger them, and obstruct the navigation: That the fenders were not unnecessarily high, and if reduced, many hundred acres would again be exposed to inundation.

Held, that before the court could decide on the case, it should have been found—1. Whether before the making the canal embankment the landowners exercised any right to raise the banks from time to time, so as to keep the water at all times in the ordinary channel and prevent its overflowing its banks in time of flood; or whether that practice commenced since 1763, when the canal was commenced. 2. Whether the course described by the special verdict, by which the flood-water was conveyed into the river at a lower point, was the ancient and rightful course or not. 3. Whether or not the raising the fenders to the present height had become necessary in consequence of the construction of the aqueduct and embankment. *Trafford and others* v. *The King* (*in error*,) H. 1832. 201

## WAY.

See PLEADING.

## WALES.

Where final process issued from the court of Exchequer on a judgment signed in a Welsh Court of Great Sessions, before its abolition, but did not recite the removal of the judgment into the Exchequer:—Held, that the elegit and judgment were not inconsistent for the purpose of evidence, though the irregularity might have been the subject of a motion. *Doe* d. *Evans and another* v. *Owen and others*, M. 1831. 150, a.

Execution permitted to issue from Exchequer on judgment signed in a Welsh Court of Great Sessions, the costs having been taxed there, without taking out a summons before a baron to correct the sug-

gestion by which the proceedings were continued in exchequer, according to Reg. Gen. M. 1830. *Rees* v. *Rees*, E. 1832. 384

## WILL.

A testator seised in fee of a house called *Plasbach*, devised it to his grand-daughter *Mary*, remainder on her death, without issue, to her brother *Walter*, then, after several other devises to other grand-children, he gave and bequeathed to his wife *the sum of 20l. yearly and every year as long as she lives*, to be paid out of *the freehold estates, and the lease of Penylan, by trustees hereinafter named*, and at the same time, notwithstanding there will be nothing to the grand-children as long as their grandmother lived. By the last clause, the testator appointed two persons "as trustees to look in that justice should be duly administered between the said parties." The grand-daughter died without issue, in the testator's life. The wife survived him:—Held, that the legal estate in *Plasbach* did not vest in the grandson *Walter*, but in the trustees. *Anthony* v. *Rees and another*, M. 1831. 100, 47

The preamble of a will "as for such temporal estate as God has given me, I give, devise, and dispose of it," was followed by words of devise of real property to *A. B.*, without words of inheritance, and by a residuary clause confined by the will itself to personalty only:—Held, that the preamble alone could not operate to pass a fee to *A. B.* *Doe* dem. *Knocker* v. *Ravell and others*, T. 1832. 719

The will devised real property to *C. D.*, without words of inheritance, and if he died before the age of eighteen, then declared that it should descend and go to *A. B.*:—*Semb.* that the devise over raised no presumption that the fee was intended to pass to *A. B.*, who was not the heir at law. *ib.*

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